United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7280

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

HOWARD SHEPPARD,

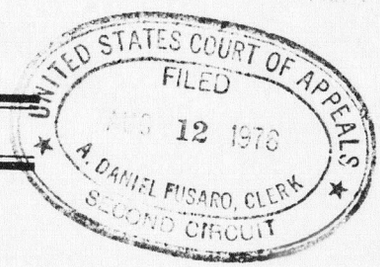
Plaintiff-Appellee,

against

PRUDENTIAL GRACE LINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



JOINT APPENDIX

LILLY, SULLIVAN & PURCELL
Attorneys for Defendant-Appellant
17 Battery Place
New York, New York 10004

MARKOWITZ & GLANSTEIN
Attorneys for Plaintiff-Appellee
50 Broadway
New York, New York 10004

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

HOWARD SHEPPARD V. PRUDENTIAL GRACE LINES INC.

73 CIV. 38[illegible]

DATE	PROCEEDINGS	Date of Judgment
Sep.11,73	Filed Complaint and issued summons	
Sep.21,73	Filed Summons and Marshal's return served on Prudential Grace Lines by Glanstein, dtd 9/10/73.	$15 [illegible]
Dec-27-73	Filed ANSWER by deft. and defts. interrogs. to pltff. (under one back)	LS&P
Dec-27-73	Filed deft's notice to take deposition of pltff. on 1-9-74	
Jan-17-74	PRE-TRIAL CONFERENCE HELD BY Carter J.	
Aug-13-74	PRE-TRIAL CONFERENCE HELD - CARTER, J.	
Aug-23-74	Filed pltf's request for discovery & inspection	
Aug-23-74	Filed pltf's interrog.	
Sep-25-74	Filed deft's answer to pltf's request for discovery & inspection.	
Oct.17-74	Filed pltfs. answers to defts. interrog.	
Oct-21-74	Filed pltf's affdvt. and notice of motion to compel - ret. 10-25-74	
Oct-21-74	Filed pltf's memorandum in support of above motion.	
Oct-23-74	Filed deft's affdvt. of Steven L. BARAM in opposition to pltf's motion to compel.	
Oct-23-74	Filed defendant's answers to interrog.	
Nov-20-74	Filed pltf's notice to take depositions of deft.	
Nov-20-74	Filed pltf's supplemental request for discovery and inspection.	
Dec-	Filed memo endorsed on motion papers: Motion granted as indicated herein. So ordered. -- Carter, J. m/n	
Dec-17-74	Filed application and order ext. time to file pre-trial order to 1-6-75 -- Carter, J. m/n	
01-30-75	~~NON-JURY TRIAL begun before Carter, J. -- case settled - submit order. - Carter, J.~~	
05-28-75	Filed consent pre-trial order. So ordered, Carter, J. R.L.C.	
4-8-76	Fld Pltff's Suppl Pretrial Memo.	
4-12-76	JURY-TRIAL BEGUN & CONTD	
4-13-76	" " & Concluded 2 DAY TRIAL - JURY - VERDICT FOR PLTFF - - JUDGE DEC. RESERVED ON DEFT'S MOTION.	
4-22-76	Fld Deft's Notice of Motion for an order for an order granting the deft Judg. ....ret 5-7-76...LOAN.	
4-22-76	Fld Deft's Memo of Law in sopport of its motion for judg.	
5-3-76	Fld Pltff affdvt in opposition to deft's motion	
5-3-76	Fld Pltff Memo " " " " "	
5-13-76	Fld Memo End on bk of motion fld 4-22-76....Motion denied. Clerk to enter judgment....Carter, J. mn (Judg C/E)	
5-27-76	Fld Judgment #76,494....Ordered that pltff Howard Sheppard have judgment vs deft Prudential Grace Lines, Inc in the amt of $84,000....R. F. Burghardt, Clerk mn Approved: Carter, J.	
6-8-76	Filed [illegible] dated 4-17-76	
6-9-76	Fld Deft's Notice of Appeal to USCA from judgment ent 5-27-76--etc..mn to Markowitz & Glanstein on 6-10-76. $250 bond filed.	
6-8-76	Fixed Bill of Costs.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By A. E. Thompson
Deputy Clerk

A 2

Docket Entries

HOWARD SHEPPARD V. PRUDENTIAL GRACE LINES INC.

73 CIV. 38

DATE	PROCEEDINGS	Dr Judg
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Dec-27-73	Filed deft's notice to take deposition of pltff. an -9-74	
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Nov-[illegible]	[illegible] on motion to compel: motion granted as indicated herein. So ordered. -- Carter, J. m/n	
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4-12-76	JURY-TRIAL BEGUN & CONTD	
4-13-76	" " " & Concluded 2 Day TRIAL - JURY - VERDICT FOR PLTFF - - JUDGE DEC RESERVED ON DEFT'S MOTION.	
4-22-76	Fld Deft's Notice of Motion for an order for an order granting the deft Judg. ....ret 5-7-76...10AM.	
4-22-76	Fld Deft's Memo of Law in support of its motion for judg.	
5-3-76	Fld Pltff affdvt in opposition to deft's motion	
5-3-76	Fld Pltff Memo " " " " "	
5-13-76	Fld Memo End on bk of motion fld 4-22-76....Motion denied. Clerk to enter judgment....Carter, J. mn (JUDG CT)	
5-27-76	Fld Judgment #76,494....Ordered that pltff Howard Sheppard have judgment vs deft Pr Prudential Grace Lines, Inc in the amt of $84,000....R. F. Burghardt, Clerk mn Approved: Carter, J.	
6-8-76	Filed [illegible] dated 4-17-76	
6-9-76	Fld Deft's Notice of Appeal to USCA from judgment ent 5-27-76--etc..mn to Markowitz & Glanstein on 6-10-76. $250 bond filed.	
6-8-76	No appearance in opposition, Bill of Costs as taxed in the sum of $ 51 in favor of the pltff . and added to the judgment-Clerk.	
6-8-76	Fld Bill of Costs on Judgment #76,494..in the sum of $510.71 in favor pltff. and added to the judgment...Clerk.	
6-9-76	Fld Undertaking for costs on appeal in the amount of $250. Bd#2473474 by National Surety corp.	
6-24-76	FLD NOTICE OF CERTIFICATION TO USCA ON 6-24-76	

A 3

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SHEPPARD, Plaintiff -against- PRUDENTIAL-GRACE LINES, INC., Defendant : 73 Civil 3883 (RLC)

JUDGMENT #76,494

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert L. Carter, United States District Judge, and a jury, on April 12 and 13, 1976, and the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury thereafter having returned a verdict in favor of the plaintiff in the amount of $120,000., and the jury having found contributory negligence on the part of the plaintiff to the degree of 30%, therefore reducing the award to $84,000., and at the conclusion of the evidence defendant having moved to set the verdict aside, and the Court having denied the said motion, and directing judgment to be entered, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff HOWARD SHEPPARD have judgment against defendant PRUDENTIAL-GRACE LINES, INC., in the amount of $84,000.

Dated: New York, N.Y.
May 15, 1976

Raymond F. Burghardt
Clerk

5/27/76

A 4

Judgment

[illegible]

[illegible]

[illegible] plaintiff in opposition. Bill of Costs
[illegible] for in the sum of £510.71, in favour of the
plaintiff, and added to the Judgment.

[illegible]
[illegible]

Richard [illegible]
Clerk.

A 5

EXTRACT FROM MINUTES

...the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the Twelfth day of April in the year of our Lord, One Thousand Nine Hundred and Seventy Six

PRESENT:
HONORABLE: Robert L. Carter
United States District Judge.

Howard Sheppard
PLAINTIFF

-vs-

Prudential Grace Lines, Inc.
DEFT

Docket No. 73 Civil 3883

Now comes the Plaintiff By Minkowitz & Glanstein
By Steven Thaler 943-6148

and moves the trial of this cause. Likewise comes the Defendant by Lilly, Sullivan & Purcell By Steven Barkan 269-0061

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial. on ... 76

Trial continued, PLAINTIFF Rests, DEFT Motion for a directed Verdict is Denied. DEFT Rests. TRIAL CONCLUDED. Jury Verdict for the PLAINTIFF (See Special Verdict Form attached). Motion Not Withstanding the Jury Verdict to be made in 10 days. And DEFT's Motion to set aside Jury Verdict as excessive. PLAINTIFF's Motion To be filed in 10 days. Decision Reserved until Time

(AN EXTRACT OF THE MINUTES)

Clerk

A 6

SPECIAL VERDICT

SPECIAL VERDICT

1. Do you find that plaintiff has established his claim that the ship was in an unseaworthy condition and this unseaworthiness played any part at all in causing plaintiff's injury?

YES ____ NO X

2. Do you find that plaintiff has established his claim that the defendant was negligent and that defendant's negligence played any part at all in causing plaintiff's injury?

YES X NO ____

3. If the answer to both Questions 1 and 2 is "NO," your verdict is for the defendant, and you should put an "X" here, and you need not answer any further questions.

____

4. If the answer to either Question 1 or 2 above is "YES," what is the total amount of damages to plaintiff? Answer in dollars and cents.

$ 120,000

5. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that plaintiff's negligence was a cause of the injury?

YES X NO ____

A 7

Special Verdict

6. If the answer to Question 5 is "YES," what percentage did plaintiff's fault so contribute? 30 %
(If the answer to Question 5 is "NO," do not answer this question.) If you entered a percentage on this question, fill in its equivalent dollar amount here: (Multiply the above percentage by the total recovery from Question 4.)

$ 84,000

7. Subtract the dollar amount stated in Question 6 from the total amount of damages stated in Question 4 and enter here the difference, which will be the net amount of damages you find plaintiff is entitled to recover.

Question 4 total	$ 120,000
Question 6 total (subtract)	$ 36,000
Net Recovery =	$ 84,000

FOREMAN

April , 1976

NOTICE OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SHEPPARD,	:	73 Civil 3883 (RLC)
Plaintiff,	:	NOTICE OF MOTION PURSUANT TO RULES 50 AND 59 OF THE FEDERAL RULES OF CIVIL PROCEDURE.
- against -	:	
PRUDENTIAL-GRACE LINES, INC.,	:	
Defendant.	:	

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of STEVEN L. BARKAN, dated April 22, 1976, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move before the Honorable Robert L. Carter at the United States Courthouse, Foley Square, New York, New York, on the 7th day of May, 1976, at 10:00 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure granting the defendant Judgment Not Withstanding the Verdict or that the verdict be set aside and a new trial be granted because the verdict was excessive and the plaintiff misrepresented his present employment status.

Dated: New York, New York
April 22, 1976.

Yours etc.,

LILLY, SULLIVAN & PURCELL, P.C.

By _____
Attorneys for Defendant
Office & P.O. Address
17 Battery Place
New York, New York 10004
(212) 269-0061

AFFIDAVIT OF STEVEN L. BARKAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SHEPPARD,	:	73 Civil 3883 (RLC)
Plaintiff,	:	
- against -	:	AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTIONS PURSUANT TO RULES 50 AND 59 OF THE FEDERAL RULES OF CIVIL PROCEDURE.
PRUDENTIAL-GRACE LINES, INC.,	:	
Defendant.	:	

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

STEVEN L. BARKAN, being duly sworn, deposes and says:

I am associated with the firm of LILLY, SULLIVAN & PURCELL, P.C., attorneys for the defendant, PRUDENTIAL-GRACE LINES, INC., and I am fully familiar with all the pleadings and proceedings heretofore had in this matter.

This affidavit is made in support of the defendant's motion for Judgment Not Withstanding the Verdict, to set aside the verdict as excessive, or in the alternative, for a new trial on the grounds that the verdict was excessive.

This action was commenced by Howard Sheppard to recover monetary damages for personal injuries that he alleges he sustained aboard SS LASH TURKIYE on April 9, 1973. At the time he was employed as the First Assistant Engineer aboard that vessel. The matter was tried before a jury on April 12th and April 13th, 1976. The jury rendered a verdict finding that the vessel was not unseaworthy, but that the defendant was negligent. It awarded

damages in the amount of $120,000 which was reduced by thirty per cent to $84,000, because of the negligence of the plaintiff.

The jury verdict should be overturned and the verdict directed in favor of the defendant, Prudential-Grace Lines, Inc. The jury verdict was inconsistent in that the jury found that the vessel was not unseaworthy, although the defendant was negligent. Inasmuch as the litigation, in part related oil on the catwalk, the presence of which was admitted by the defendant's Chief Engineer, Mr. Josephs, the only way a jury could determine that the vessel was not unseaworthy was to find that the oil on the catwalk was not the proximate cause of Mr. Sheppard's injuries. If that were so, then the finding that the defendant was negligent because of this presence of oil was inconsistent in that there could be no proximate cause between the defendant's negligence and Mr. Sheppard's injuries if there was no proximate cause between the condition that existed and his injuries, as determined by the verdict of seaworthiness. In view of this inconsistency, a verdict should be directed in favor of the defendant or a new trial be granted.

The verdict of $120,000 was exorbitant and permitting this verdict to stand will represent a miscarriage of justice. The plaintiff admitted that has been employed as a First Assistant Engineer subsequent to April 9, 1973. He also admitted that he feels better than he did after the accident. He contended that he had lost wages because of the fact that he had to refuse some

overtime and certain employment if there was a lack of adequate assistance for him aboard the vessel. The plaintiff never, in any of the testimony, supported these statements with the names of said vessels, except for the SS AMERICAN RANGER, or the amounts that he claims he has lost.

Sheppard's only specific testimony relating to lost wages was to the effect that he lost twenty-five days during the year 1973 after being marked fit for duty on May 2, 1973. Thereafter, he apparently claimed an additional six days in August of 1974. On those occasions he was not examined by a doctor, nor did he indicate any other further lost time, except to allege that he quit the SS AMERICAN RANGER on March 29, 1976, because he did not feel he could do the work. He also indicated that except for the SS AMERICAN RANGER, all the jobs he had were relief jobs and that he did not obtain steady employment until he joined the SS AMERICAN RANGER.

With regard to his lost earnings, the plaintiff's attorney in computing them generally, in the pre-trial order dated May 13, 1975, claimed lost wages to that date in the amount of $9,000. There was not testimony of any specific lost time from the period of May 13th, 1975 up until the date of the trial. Accordingly, even when using the plaintiff's attorney's figures, his lost earnings to the date of the trial amounted to $9,000.

In attempting to prove lost wages, the plaintiff obtained the testimony of an economic expert, Mr. Sharmon, who is an employee of the plaintiff's union. He testified to the

contract rates for the wages on various vessels on which the plaintiff sailed. Mr. Sharmon set forth the general figures and there was no testimony to indicate that Sheppard lost any wages because of his injury. Mr. Snarmon admitted that he had no knowledge of the plaintiff's earnings (Pg. 127) and that Mr. Sheppard could have earned more on any of the vessels on which he sailed than the average amounts that Mr. Sharmon testified was the yearly union average for full time employees working nine months on one vessel. There is no evidence in the trial that Mr. Sheppard did not earn those average amounts. Mr. Sharmon was questioned as to the plaintiff's earnings (Pg. 127). He stated:

Question: So he could have earned more at the time than you have stated in your figures?

Answer: He could have.

Question: Than this would be dependent upon the actual period of time he worked and his pay-off for that period of time?

Answer: Those are the prime factors.

Question: Than you have no knowledge of whatever they are?

Answer: No, I do not.

Question: Am I correct in stating that these figures that you gave us have little relevance to his actual earnings or potential earnings?

Answer: They are related.

Question: How related are they?

Answer: Depending on how much he worked that year.

Question: Without knowing that, then you can't provide figures, am I correct?

Answer: That is correct.

There was no attempt by the plaintiff to show how much Mr. Sheppard lost on each of these vessels. Consequently, Mr. Sharmon, the plaintiff's own expert was unable to compute the plaintiff's lost earnings, if any. Thus, the plaintiff failed to sustain his burden of proving damages for past lost earnings, other than for the periods of time that he said he absolutely did not work because he experienced pain.

Mr. Sharmon also testified that it would not be unusual for a man to wait fifteen days between jobs (Pg. 30). Accordingly, Mr. Sheppard, who was seeking employment on different vessels, would not have been able to earn the salary of an engineer who worked an entire year. Thus, Mr. Sharmon admitted that he would have probably earned less than the amounts that he testified engineers earn.

With regard to future lost earnings, the plaintiff's attorney argued, in his closing arguments, that vessels on which the plaintiff had been sailing as a relief engineer would entitle permanent engineers to earn up to or more than Mr. Sheppard earned during the year 1975. The figures that Mr. Sharmon used were objected to by the defendant and their inclusion permitted the plaintiff's attorney to speculate as to lost wages and to set forth lost earning figures that were not substantiated by the testimony. In addition, the plaintiff contended that he was a

permanent First Assistant Engineer aboard SS AMERICAN RANGER. He also contended that he was forced to quit that job because he could not obtain adequate assistance there. However, as the annexed affidavit of United States Lines, Inc. with its annexed exhibits indicate, Mr. Sheppard did not quit that vessel, but is merely on vacation and able to return upon completion of his vacation. This misrepresentation on the part of Mr. Sheppard had a direct relationship to damages. To permit the inclusion of future lost wages on this type of testimony would be speculative and a miscarriage of justice.

With regard to lost wages to date, if we give the plaintiff the benefit of the doubt, at the most he lost wages for a period of fifty-four days, and even at the highest figure set forth by Mr. Sharmon of $4200 for LASH vessels at today's rate, this would amount to a loss of $7560. In fact, the amount of lost wages set forth by the plaintiff's attorney in the pre-trial order was only $9,000.

If we consider that the verdict of $120,000 represented $111,000 of present and future pain and suffering, after future pain and suffering was discounted over the 20.3 years life expectancy of the plaintiff, this figure would be grossly excessive. The plaintiff, in his own testimony, indicated that after he was marked fit for duty on May 2, 1973, approximately three weeks after the occurrence, he was never again marked not fit for duty. He also indicated that he received treatment on one occasion during that period of time and that thereafter he

did not receive any treatment. He did indicate that he reported to the hospital and complained about his back on a few occasions after May 2nd, 1973, but on those occasions he attended and received treatment for other ailments which apparently bothered him more than his back complaints. Consequently, an award of $111,000 for pain and suffering to an injured seaman who never underwent surgery, or received any treatment, and is still capable of working, was grossly excessive.

WHEREFORE, defendant respectfully requests that the Court either grant it Judgment Not Withstanding the Verdict or the verdict be set aside and a new trial be granted because the verdict was excessive and the plaintiff misrepresented his present employment status.

Respectfully submitted,

STEVEN L. BARKAN

Sworn to before me this
22nd day of April, 1976.

A 16

AFFIDAVIT OF EDWARD MERKE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SHEPPARD,

Plaintiff,

- against -

PRUDENTIAL-GRACE LINES, INC.,

Defendant.

73 Civil 3883 (RLC)

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

EDWARD MERKE, being duly sworn, deposes and says:

That he is employed by United States Lines, Inc. in the capacity of Supervisor of Marine Personnel.

I have examined the personnel record of Mr. Howard Sheppard, a copy of which is annexed hereto and marked Exhibit "A". I have also examined the furlough record of Mr. Sheppard, a copy of which is also annexed hereto and marked Exhibit "B". These records indicate that Mr. Sheppard left SS AMERICAN RANGER on March 29, 1976 to go on vacation. There is no indication that he quit or will not return to the vessel.

EDWARD MERKE

(Sworn to April 22, 1976)

Spencer USA# 53407 9-11-60 SEE FILE FOLDER FOR PREVIOUS SERVICE

U. S. L. No. 14780

Social Security Number 132-28-5941

UNITED STATES LINES

PERSONNEL RECORD CARD

ARTICLE No.

NAME (in full) SHEPPARD HOWARD R.
Last Name First Name Middle Name

CREW LIST DATA

Birthplace	Citizen or Subject of	Age	Height Ft.	Height In.	Description Complexion	Description Hair	Rating	Name & Address of Next of Kin
Arkansas	USA	43	5	9	Ddy	Brn	3A/E	Wf: Legion 955 ~~Annapolis Rd.~~, Mrs. Claudia B. ~~Baltimore 21, Maryland~~ Box 214 Jacksonville, Ill. 72276

If (Naturalized) (First papers) (Head tax paid)

Date Place Court

Date of Birth 1-11-23 Married? Yes Color Eyes Blue

Mother's Name before Marriage Yes or No Father's Name C. C.

Disch. Book or Cert. Ident. No. Z [illegible] License No. 155-193

Address Date of Change

Address " "

Address " "

Address 114 East Longford St. " "

Address Balt. Md. c/o A.E.C.H. " "

Tax Status S-4

Vessel AMERICAN ROVER Date 4-27-66

Port @ Balt., Md. Signed

60178-10M-4-64
PTD. IN U.S.A.

JFP

A-17

Exhibit A - Personnel Record of Howard Sheppard
Annexed to Affidavit of Edward Merke

VESSEL	RATING	FROM	TO	SERVICE MO	SERVICE DAYS	REMARKS
Am Eagle	3rd A/E	2-1-66	4-17-66			
Sea Cloud	1st A/E	5-15-66	11-7-66			ex Bull Lt.
Sea Cloud	1 A/E	12-22-66	2-22-67			Rel
Am Eagle	3rd A/E	3-30-67	4-5-67			
Am Reliance	1st A/E	5-12-67	8-2-7[illegible]			
Atl Charger	1 A/E	6-3-70	6/15/70			Rel
Am Alliance	1st A/E	4-6-71	4-24-71			
Am Reliance	1 A/E	6/29/72				
Am Eagle	1st A/E	[illegible]	4/25/75			[illegible] (Hawaii) vac.
Am. Ranger	1 A/E	10/21/75	3/29/76			vac

Exhibit A Annexed to Affidavit of Edward Merke

BEST COPY AVAILABLE

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EXHIBIT B--FURLOUGH RECORD OF HOWARD SHEPPARD
ANNEXED TO AFFIDAVIT OF EDWARD MERKE

UNITED STATES LINES, INC.

APPLICATION FOR VACATION AND/OR LEAVE OF ABSENCE — LICENSED OR STAFF OFFICERS

S/S [illegible]

I, Howard R.L. Sheppard (Full Name), 1st A/E (Rank), 19 (Article No.)

hereby make application for a leave of absence, not to exceed 120 days, from 3/30/76 (Date) 19

to (Date) 19, inclusive, for the reason indicated: Vacation (x), Medical ( ),

Personal ( ), Vessel Lay-Up ( ).

Address while absent:

618 Cloverdale Rd.

Jacksonville, Ark. 72076

Signature

Date 3/29/76 19

Approval of this application is recommended:

(Department Head)

Date 3/29/76 19

(Master)

Date 3/29/76 19

Last date paid: 3/29/76

ALL SPACES ABOVE TO BE COMPLETED ON BOARD

Approved:

(Superintendent)

Date 3/29/76 19

NOTE TO APPLICANT:

If you are unable to return to your vessel at the time stipulated above, you must notify, by letter or telegram, your department head on board, your department head ashore and the union of which you are a member. This notification is necessary at the end of each voyage if you are unable to reship. It is the only way in which your job can be protected.

If the above instructions are not carried out a permanent replacement may be assigned in your stead.

One of your copies hereof must be presented to your department head ashore when reshipping, the other you may attach to your application for vacation pay from your Vacation Plan.

DISTRIBUTION:

Original and four copies to be completed. One copy to be retained on board. Original and three copies presented in person by the officer to his department head ashore for approval. All copies to be signed by that department head, then two copies returned to the officer for his use.

51707-30M-8-72

AFFIDAVIT OF STEVEN THALER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

HOWARD SHEPPARD,

Plaintiff,

-against-

PRUDENTIAL-GRACE LINES, INC.,

Defendant.

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION

INDEX NO. 73 CIV. 3883 (RLC)

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Plaintiff, by his attorneys, MARKOWITZ & GLANSTEIN, by plaintiff's trial counsel, STEVEN THALER, submits this affidavit in opposition to defendant's motion for a judgment notwithstanding the verdict and to set aside the verdict as excessive.

THE OCCURRENCE

On April 9th, 1973, at about 11:00 A. M., Mr. Sheppard slipped and fell to the deck on a catwalk in the lower engine room on the vessel SS LASH TURKIYE.

Mr. Sheppard was the first assistant engineer on board the vessel and under the direct supervision of the Chief Engineer. The Chief Engineer had boarded the vessel sometime before Mr. Sheppard, and in fact, had been permanently attached to the vessel since its commission in 1971. The Chief testified that he knew of the leak and he knew of the cause of the leak; that he knew of the situation before Mr. Sheppard boarded the vessel; that at best burlap

bags from time to time were placed over the oil spill and that no attempt by the Chief Engineer had been made to repair the leak and/or clean the oil from the catwalk.

The testimony further indicates that on or about April 1st, 1973, the Chief Engineer attended a Safety Committee Meeting on board the vessel. The Chief Engineer stated that he forgot to mention the leak and the oil on the catwalk at the Safety Committee Meeting. The Chief took no steps to remedy the leak and/or clear the oil from the catwalk. Only after Mr. Sheppard's injury did the Chief Engineer place a trough under the leak to be caught in the pail.

At the time of Mr. Sheppard's accident, the Chief was in his stateroom and not in the engine room where he should have been, given the circumstances.

At trial, the testimony demonstrated that the Chief Engineer is the individual responsible for the entire engine room and that repairs cannot be effected without his direct order. Although the Chief Engineer knew of the leak, he did not repair it himself, nor would he direct or effect an order to get rid of the leak and the oil on the catwalk.

MEDICAL FACTS

After the injury, the plaintiff went to the Public Health Hospital in New York and then to the Public Health Hospital in Norfolk. He was marked "not fit for duty". On or about May 2, 1973, plaintiff received a"light fit for duty"

status. The hospital records at Public Health stated that the plaintiff had a chronic lumbosacral strain. During the testimony, the medical facts indicated that the plaintiff has spasms of the muscles, localized tenderness and loss of sensation to the left leg. His back is sore and stiff and there is a restriction of motion. The Public Health Hospital prescribed medications and heat. Since the accident, the plaintiff has had recurrent back pains and has been taking pain killers. After attending the Public Health Hospital in Norfolk, the plaintiff thereafter returned to the Public Health Hospital on several different occasions.

The plaintiff's pain is constant and he continues to take pain killers.

According to Dr. Koven, plaintiff's condition is permanent and he will always have pain in his back. The doctor further testified that the only treatment that plaintiff can have is to avoid that which produces strain. On cross-examination by the defendant, Dr. Koven said that the plaintiff is capable of working within certain limitations; strain must be avoided; and he further stated that he did not think that plaintiff is capable of working as a first assistant engineer.

DAMAGES

As a result of plaintiff's injury caused by his fall on board the SS LASH TURKIYE, plaintiff has sustained a permanent back injury. The back injury has altered plaintiff's

life style in regard to the activities that he can no longer do. He cannot run, he cannot strain himself, he cannot lift heavy objects or do heavy work.

Since the date of plaintiff's accident, plaintiff has had to be selective in terms of the ships he has worked on. Because of his injury, he is destined to work as a relief engineer. In addition, plaintiff has lost and will lose substantial amounts of money inasmuch as he is unable to exert any strain, thereby losing overtime.

Plaintiff did not return to work until June 22, 1973. He remained out of work because of his back problem. He then worked periodically on various ships. Before joining the ships, he attempted to ascertain the nature of the work to make certain that it would not cause any strain. His job selection therefore became very restricted. During his course of employment, he turned down overtime and on various ships, could not perform the work as required. As a result of his back injury, he has been unable to remain on ships as a permanent first assistant engineer. A first assistant engineer is required to work in confined spaces, climb ladders daily, and is responsible for the engine department under the direct supervision of the Chief Engineer. In view of the plaintiff's disability, the probabilities of finding a permanent job and maintaining it are not real. To obtain relief work, the plaintiff is required to go to the Union Hall and must wait for a job as a first assistant to become available. In the

event that a job is available for the plaintiff as a first assistant, the first assistant must then determine whether or not the work required of him will consist only of light duty. Under normal conditions, a first engineer who serves in a relief capacity can wait up to fifteen days to obtain a job. In view of Mr. Sheppard's condition, and the limited number of vessels on which he can work, the probabilities of obtaining a job in a relief capacity are even less. It is reasonable to conclude that given Mr. Sheppard's condition, he may have to wait for months until he can accept a job which will permit him to perform light duty.

As aforementioned, Mr. Sheppard's disability has caused him to work on a relief basis. He served on the AMERICAN RANGER as a first assistant engineer in a permanent capacity, but because of his back problems has requested a transfer from the vessel.

Defendant raises the issue of plaintiff's request for the transfer from the AMERICAN RANGER and states that the plaintiff misrepresented the facts. Plaintiff did not misrepresent any facts and was honest and candid in his answers. It is unfortunate that defendant raises such an issue. Defendant's representation is untrue. In the first instance, a transfer does not have anything to do with the fact that Mr. Sheppard is leaving the AMERICAN RANGER. Mr. Sheppard has testified that he will no longer sail on the AMERICAN

RANGER because of his back problems, in view of the fact that he cannot perform the work on board the ship because of his back problem. A request for transfer means that an individual who is permanently attached to a ship for a company seeks to join another ship of the same company. A transfer has nothing to do with leaving the ship and joining another ship of a different company. Thus, if Mr. Sheppard does not obtain a transfer from U. S. Lines when he returns from vacation, he will then have to leave U. S. Lines and try to find employment on a ship owned and operated by a company other than U. S. Lines. The fact is that Mr. Sheppard has left the AMERICAN RANGER and will not return to it.

As a matter of fact, the plaintiff told the Chief Engineer, the direct representative of the company, that he wanted a transfer. The Chief called the company office and advised that Sheppard wanted a transfer. Mr. Sheppard was then advised by the Chief that the company had told him that they doubted if the plaintiff could transfer to another ship within U. S. Lines, but that the U. S. Lines may be able to find a lesser job as a second assistant engineer or a third assistant engineer later on. Plaintiff then stated that he would go on vacation and thereafter try to transfer. If he could not transfer, he would look for another ship.

Mr. Sheppard also told the dispatcher, Rueben J. Olson, to arrange a transfer for him. In view of the fact that Mr. Sheppard was going on vacation in view of the shipping

rules a transfer cannot be effected. Thus, when Mr. Sheppard returns from his vacation, he is confronted with the following situation. If U. S. Lines does not have another ship on which plaintiff can work light duty as a first assistant engineer, plaintiff will have to look for another ship owned and operated by a different company on which he can get light duty work as a first assistant engineer.

*See affirmation of Mr. Olsen attached.

As indicated at trial, the earnings of first assistant engineers are based upon the class of ship. In addition, the overtime rate is approximately 91% of the base wages earned on board the various classes of vessels. The breakdown of the wages of a first assistant engineer based upon contract and actual payrolls of the various companies, plus vacation wages, set forth the amounts that a first assistant engineer earns on any of said vessels to which he is permanently attached.

The Class A 3 vessels, of all the classes testified to, has the highest rate of earnings and include the PRESIDENT MONROE and the LASH TURKIYE, vessels owned and operated by the defendant. The earnings are as follows:

1973 - $ 37,806.00
1974 - 41,199.00
1975 - 45,261.00
1976 - 48,247.00
1977 - 50,164.00

The AMERICAN RANGER, the vessel on which plaintiff was permanently attached as a first assistant engineer and will

not return to because of his back injury shows a first assistant engineer earning for the period 1973 through 1977, as follows:

1973 -	$ 22,041.00
1974 -	30,420.00
1975 -	33,684.00
1976 -	35,797.00
1977 -	37,380.00

The earnings on the AZALEA CITY for 1973 through 1977 for a first assistant engineer are as follows:

1973 -	$ 22,480.00
1974 -	30,872.00
1975 -	34,000.88
1976 -	36,140.00
1977 -	37,666.00

Plaintiff's earnings for 1972, as indicated in the tax return, was $24,710.63. The earnings do not include the earnings for employment on the SANTA ANA, one of defendant's vessels, for the period 11/18/72 through to 1/19/73 as a first assistant engineer. The earnings on the SANTA ANA for this period of time was received in 1973, and included in the 1973 returns. The 1973 returns indicate wages received in 1973 in the amount of $27,746.59. The wages stated in 1974 show wages, etc. in the amount of $20,406.19. The wages in 1975 show $29,417.66. Plaintiff did not take his vacation in 1974, and thus received his vacation wages in 1975. The total of vacation wages received in 1975 amounted to $9,703.90. The average earnings for 1975 and 1974 is therefore $24,911.42.

The earnings of a first assistant engineer on the

AZALEA CITY in a permanent capacity for 1974 is $30,872.00; 1975, $34,000.00; 1976, $36,140.00; 1977, $37,666.00.

On a vessel such as the AMERICAN RANGER, a first assistant would earn in 1974, $30,420.00; 1975, $33,684.00; 1976, $35,797.00; 1977, $37,380.00.

The earnings of a first assistant on a vessel such as the LASH TURKIYE would earn for 1973, $37,806.00; 1974, $41,199.00; 1975, $45,261.00; 1976, $48,247.00; 1977, $50,164.00.

A first assistant engineer on the SS NEW YORKER for 1974 would earning $32,949.00: 1975, $35,073.00; 1976, $37,206.00; 1977, $38,777.00.

The actual wages earned in 1975 approximating $25,000.00 indicates a differential in the actual earning capacity of a first assistant engineer and a loss of earnings as follows:

AMERICAN RANGER - earning capacity, $33 684.00 (1975)
AZALEA CITY - earning capacity, $34,000.00 (1975)
SS NEW YORKER - earning capacity, $35,073.00 (1975)
LASH TURKIYE - earning capacity, $45,261.00 (1975)

Plaintiff is presently 53 years old and has a work expectancy to at least age 65. Engineers, such as Mr. Sheppard, do not have to retire at 65 years of age and if they so desire, may work past age 65.

In view of the evidence presented, and the permanent nature of plaintiff's injury, his pain and

suffering, his need to avoid strain and the precarious nature of his employability because of the injury, the verdict and the amount rendered by the jury based upon the evidence presented at the trial certainly is not shocking or a miscarriage of justice.

WHEREFORE, it is respectfully requested that defendant's motion in all respects be denied.

Sworn to before me
this 30th day of April, 1976.

Steven Thaler
STEVEN THALER

MARYANN CABAN
Notary Public, State of New York
No. 24-4614318
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

A 30

Affidavit of Steven Thaler

April 26, 1976

To whom it may concern;

I, Rueben J. Olson, do affirm that on March 31, 1976, Mr. Howard Sheppard, First ass't Engineer on vacation from the S/S AMERICAN RANGER, United States Lines, did ask me about getting a transfer from the S/S AMERICAN RANGER to another vessel of United States Lines.

I did tell Mr. Sheppard that I would go through channels via telephone and talk with personnel at U.S. Lines, Inc. and see if a transfer could be arranged between all parties concerned. I did in fact tell Mr. Sheppard that he could not be transferred while on vacation.

I do affirm that above statements are true and correct.

Rueben J. Olson

Rueben J. Olson
Dispatcher

RECEIVED
APR 23 1976
LAW OFFICES
MARKOWITZ & GLANSTEIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD SHEPPARD,

Plaintiff,

- against -

PRUDENTIAL-GRACE LINES, INC.,

Defendant.

NOTICE OF MOTION
AND AFFIDAVIT

LILLY, SULLIVAN & PURCELL, P.C.
17 BATTERY PLACE
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10004
269-0061

ATTORNEYS FOR Defendant

5/13/76

Motion denied. Clerk to enter judgment.

Robert L. Carter
USDJ

U.S. DISTRICT COURT
FILED
MAY 14 1976
S.D. OF N.Y.

MOTION

Received by
Steven Pollack
Marquardt & Chrystie
April 22, 1976

A31
Memo Endorsed on
May 13, 1976

H O W A R D S H E P P A R D, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. THALER:

Q Mr. Sheppard, state your address, please.

A My address is Schofield, Nevada, the present address.

Q What is your occupation, sir?

A I'm a merchant seaman; marine engineer.

Q When did you become a marine engineer?

A November, I believe, 1944.

Q You received a license to become a marine engineer on merchant ships?

A Yes.

Q Did there come a time when you joined the Lash Turkiye?

A Yes, sir.

Q Do you recall the date?

A Not the exact date. I think it was 47 days before April 9, 1973.

Q What was your position on that ship?

A Relief first assistant engineer.

Q Was that your first time on the ship?

* * *

Lash Turkiye.

Q Are the statements in that document accurate?

A Yes, sir.

Q Did you sign that document?

A Yes, sir.

Q And the ship issued the document to you, is that correct?

A Yes, sir.

MR. THALER: At this time, your Honor, I would like to submit Plaintiff's Exhibit 2 into evidence, which is a Master's Certificate and requisition for a report of medical attention.

MR. BARKAN: No objection, your Honor.

xx (Plaintiff's Exhibit 2 received in evidence)

MR. THALER: If I may read this short statement to the jury, your Honor.

(Mr. Thaler read from Plaintiff's Exhibit 2 to the jury)

Q Mr. Sheppard, did you seek medical attention?

A Yes, sir.

Q Where did you go?

A I went to the outpatient clinic of Marine Hospital, Hudson and Jay.

Q Did you see a doctor there?

A Yes, sir.

Q Did the doctor give you treatment?

A No, sir.

Q What happened at the hospital?

A The next morning I went to Hudson and Jay, the Marine Hospital. I got there about 8:05 in the morning, a.m., and I stayed all day long until 4:15 in the afternoon and then I got in to see the doctor and the doctor said he had an appointment and he had to go pretty soon and he wanted to know if I could come back the next day.

And I told him I'd rather go on to Norfolk, and he gave me an unfit for duty because of my diabetic condition and the nurse had made a sugar test previously.

Q What happened thereafter?

A Then I went back to the ship.

Q Did you attempt to get your belongings?

A The next morning I went downtown and bought two more suitcases and went aboard the ship and packed my gear and brought it off a little at a time.

Q Did you request any assistance in that?

A Yes, sir.

Q Can you describe what happened?

THE COURT: What's this got to do with this case?

MR. THALER: I will withdraw that.

At this time I would like to submit into evidence the Public Health records from Norfolk, Virginia for the period up to February 11, 1974.

I submit it as Plaintiff's Exhibit 3.

xx (Plaintiff's Exhibit 3 marked for identification)

MR. THALER: At this time I submit it into evidence, your Honor, as Plaintiff's Exhibit 3.

MR. BARKAN: No objection, your Honor.

x (Plaintiff's Exhibit 3 received in evidence)

(Mr. Thaler read from Plaintiff's Exhibit 3 in evidence to the jury)

Q When you went to Norfolk for medical attention, did you receive any treatment?

A Yes, sir.

Q What treatment did you receive?

A They told me to take hot soaks and they gave me pain pills and they gave me some kind of pills they said was muscle relaxing pills.

Q What complaints had you made?

A Sir?

Q What complaints had you made?

A By me?

Q Yes.

A I complained of a back injury.

Q Did you complain of pain?

A Yes, sir.

Q Whereabouts?

A In my back.

Q Where about in your back?

A I could show you about where. Right in this area here (indicating)

Q Lower back?

A No, not lower. Above the lower back.

Q Did they prescribe any -- you said hot soaks, they prescribed hot soaks?

A Yes, sir.

Q When did you next return to work, Mr. Sheppard?

A June 22, 1973.

Q What problems, if any, were you having from the time of the injury up until June 22, 1973?

A I was having sore back, stiffness. In the beginning I could hardly walk. Later on it got to where I could walk a little better.

Q What ship did you join in June?

A The Motor Vehicle New Yorker.

Q What position?

A Second assistant engineer.

Q Is a second assistant engineer - that's lower than a first assistant engineer, is that correct?

A Yes, sir.

Q Were you a watch-standing second assistent engineer?

A I was watch-standing.

Q What does that mean?

A That means--

THE COURT: What does this have to do with the case?

MR. THALER: It has to do with his duties and responsibilities in having to work in particular positions which did not require heavy work or heavy lifting, your Honor.

And a watch-standing second is someone who just stands a watch.

THE COURT: If you are going to make a claim about that, it seems to me that your doctor is going to tell us about it. He knows what kind of jobs he has held.

MR. THALER: There are so many wage differentials for an engineer.

THE COURT: You can ask him what jobs he has held but whether or not he can perform any other function is for a doctor to tell us.

MR. THALER: Not what function he can perform but what function he has performed, your Honor.

THE COURT: The two are not the same?

MR. THALER: No, I am asking what he has done. Like as a watch-standing engineer, what does a watch-standing engineer do.

A second assistant can be a day worker or a watch-stander. A day worker would require him to go into boilers and do things. A watch-stander just stands a watch and doesn't do any work.

THE COURT: I gather that what you are really claiming is that by virtue of his injuries there are certain jobs he cannot do, is that correct?

MR. THALER: That is correct.

THE COURT: Why can't he give us what jobs he can perform and let his doctor tell us what jobs he can or cannot do.

Q You were watch-standing second on this ship, is that correct?

A Yes, sir.

Q For what period of time did you work on this ship? Do you have records there?

A Yes.

Q What do those records contain?

A It contains the ships and the days I worked.

THE COURT: I think you better mark that.

What are you going to use that for, to refresh his recollection?

MR. THALER: Yes.

Q Do you need that to refresh your recollection, Mr. Sheppard?

A Yes, sir.

THE COURT: Then mark it.

You can look at it after he is through with it.

(Plaintiff's Exhibit 4 marked for identification)

THE COURT: He can see it when he gets up to examine him. All he is using it for is to refresh his recollection, which he has a right to do.

THE WITNESS: Would you repeat the question, please?

Q I believe I asked what are the periods of time you worked on the New Yorker?

THE COURT: You're going to get before us the history of his various jobs since he left this ship?

MR. THALER: Yes.

THE COURT: You don't have to ask that. If he has it there, let him give it to us without a series of

questions. He has it all outlined, I suppose.

What are the jobs you performed, Mr. Sheppard, from the time you left the ship when you were injured, until the present?

THE WITNESS: All right, sir.

June 22, 1973 until July 8, 1973 I was second assistant engineer on the S.S. New Yorker. It is a twin diesel.

THE COURT: You better tell us what you did.

THE WITNESS: I was a watch-standing assistant second on there for a period of 16 days.

My duties on there were to stand a watch and to inspect the operating machinery and equipment, make sure that they functioned properly. Sing the logbooks and answer bells from the bridge. Things like that.

Q What was your next job?

A I took a job on the President Monroe eight days later on 7-16-73 to 7-28-93 as first assistant engineer for a period of 13 days.

Q What type of work did you do on that ship?

A I was first assistant engineer and I was a day worker. I only worked five days a week. I had explained to the chief engineer when I first went on that I wouldn't be able to do any heavy lifting, but the ship was hung up and

couldn't go throught the Panama Canal, so I had taken a night job on that ship and a night job on that ship was when you go down on board the ship at nighttime and relieve the regular ship's engineers while the ship is in port.

While I was on there the chief engineer asked me if I would make the trip because they needed a first assistant before they could sail.

I explained to him that I couldn't do any heavy lifting and I told him if he would call the union agent and if it was agreeable with him I would take the ship to the West Coast.

Q What was your next position?

A Next ship was the Azalea --

THE COURT: I think that's the end of that.

Did you go with the ship?

THE WITNESS: Yes, sir.

Q How many days did you sail on it?

A I was on the ship for a period of 13 days.

Q What was the next ship?

A The next ship was on the Azalea City on 8-20-1973 to 10-8-73 as first assistant engineer for a period of 60 days.

I was off between the President Monroe and Azalea City for 24 days and about 16 days of that I wasn't able to

work.

Q What jobs did you perform on the Azalea City?

A First assistant engineer.

Q Did you do any heavy lifting, things of that nature?

A No, sir.

Q What arrangement if any did you have with the ship before you joined it?

A I didn't have any real arrangement but I had told the chief engineer that I wouldn't be able to do any heavy lifting.

Q You got off that ship in October, the 18th day of October of 1973?

A Yes.

Q When was your next ship after that?

A The next ship after that was the Green Wave.

Q What position did you hold on that ship?

A I was relief first assistant to Vietnam and back.

Q From when to when?

A 10-23-73 to 1-31-74, a period of 70 days.

A few days after going on the Green Eave, I was helping a cadet lift an armature into a lathe and I hurt my back again. By the time I got to Vietnam my

back was much better and I didn't get off. I stayed on the ship and came back to the United States.

Q After January 31, 1974, when was your next ship?

A I went back on the New York.

Q When was that?

A On 5-10-74 to 7-12-74 as first assistant engineer for 64 days.

Q What were you doing from the time that you left the Green Wave January 31, 1974 to the time you rejoined the New Yorker -- is that the ship?

A Yes, sir. I did work for 8 days as a night relief engineer.

Q Between January 31 and May 10?

A Yes, sir.

Q What does a night relief engineer do?

A He stands a port watch, port relief watch in port while the other engineers are onshore.

Q How were you feeling during the period of time you left the Green Wave until the time you left the New Yorker?

A About the same. My back hurt me a lot. I had a stiff back.

Q Were you taking any medication?

A Yes, sir.

Q Any treatment?

A Just the same treatments. Pain pills and the soaks.

Q After July of 1974, when was your next ship?

A I went back on the Azalea City as second assistant engineer from 7-22-74 to 8-16-74 for 26 days.

Q What type of second assistant?

A I was a watch-standing second assistant engineer and I stood a routine watch on board the ship.

Q And you left that ship on August 16, 1974, is that correct?

A Yes, sir. I left the ship on August 16, 1974. I quit.

Q Why is that?

A Because the chief engineer told me that he was going to do a lot of boiler work because--

THE COURT: We can't have what he told you. I don't think it is that important anyway.

Q For what reason did you leave --

THE COURT: What difference does it make to this case why he left?

MR. THALER: He had to leave because of the heavy work which was required --

THE COURT: Well, we note your contention is that

all he could do would be to do light duty.

What was your next job on this ship?

A On the New Yorker again. First assistant engineer for nine days.

Q From when to when?

A From 9-6-74 to 9-14-74. In between the Azalea City and the New Yorker I worked a period of 14 nights on night jobs.

THE COURT: Continue.

Q Your next ship?

A The next ship was the New Yorker again on 9-26-74 to 10-3-74 as third assistant engineer for a period of eight days.

My next ship was the American Ranger from 1-24-75 to 4-24-75.

Then from the New Yorker on 10-3-74 until the American Ranger on 1-24-75,I worked 25 days as a night relief engineer.

And I went to welding school for five weeks.

Q Were you permanently attached to the American Ranger?

A Yes, sir.

Q After 4-24-75 on the American Ranger, when did you next go back to work?

A I went back to work next on the American Ranger on 10-21-75 to 3-29-1976.

Q Mr. Sheppard, prior to your injury on April 9, 1973, did you engage in any kind of activities as such?

A Yes, sir.

Q What types of activities did you partake in?

A Oh, just regular routine sports like fishing and things like that. I did a lot of running and jogging and exercises.

Q Did yourform of activity change after April 9, 1973?

A Yes, sir.

Q Can you describe in what sense?

A Well, I don't do any heavy lifting. A couple of times I tried to run, to my sorrow. I don't do any jogging or any exercises. No fishing. I used to go prospecting a lot. I don't do that any more.

THE COURT: You are saying you don't engage in any exercises at all?

THE WITNESS: No, sir.

Q Mr. Sheppard, what complaints, if any, do you presently have?

A I still have back pains. My back is not as stiff as it was and I still have back pains but I can do things

now that I couldn't do before.

Q Like what?

A Well, I can change a tire now. I couldn't do that before. In the beginning I couldn't drive a car but I can do that now. No great distance, but I can drive.

Q Before, what do you mean by "before"?

A Just shortly after the accident.

Q Are you going back to the American Ranger?

A Well, I have asked for a transfer.

Q Why did you ask for a transfer, Mr. Sheppard?

A Because up until now I had other people under me that could do the heavy work and now I have some men on there that are not able to do the work either so I'm going to try to find another ship because I won't be able to do it either.

MR. THALER: At this time,your Honor, I would like to offer the tax returns of the plaintiff for the period 1971 up until the present, 1975 -including 1975.

THE COURT: When was the accident?

MR. THALER: Excuse me?

THE COURT: When was the accident?

MR. THALER: April 13, 1973.

THE COURT: All right.

I don't understand why we need the tax returns

for 1971.

MR. THALER: 1972, 1973, 1974 and 1975, with Mr. Sheppard's W-2 forms. Plaintiff's Exhibit 5 for identification.

:x (Plaintiff's Exhibit 5 marked for identification)

THE COURT: I gather the purpose of this is to show what he earned during those years?

MR. THALER: Yes, sir.

MR. BARKAN: I haven't seen those, your Honor. I understood there was to be a form for 1975?

MR. THALER: There is no form for 1975, just the W-2 forms. They haven't been made out yet.

MR. BARKAN: No objection.

xx (Plaintiff's Exhibit 5 received in evidence)

Q Mr. Sheppard, during your services on board the various vessels, the first assistant engineer has an opportunity to work overtime, is that correct?

A Yes, sir.

Q And for overtime the individual is compensated at a particular rate, is that correct?

A Yes, sir.

Q During the course of your services on the various vessels that you just mentioned, did you have an opportunity to refuse overtime?

A Yes, sir.

Q How often?

A Well, I suppose any time I want when I don't think I am able to do the work. I have refused overtime quite often.

Q I show you your tax returns for 1972, 1973 and 1974 and these are the W-2 forms you gave me.

In 1972 what were your earnings, your gross earnings?

THE COURT: It probably would be, since they are in evidence --

MR. THALER: There are carryovers, that's the problem.

THE WITNESS: $27,369.98.

Q Is that for 1972?

A Yes, sir.

THE COURT: I was going to suggest it seems to me it would be simpler, since they are in evidence, for you to read to the jury what they disclose.

Q In 1972 what were your earnings from wages at sea, Mr. Sheppard?

A $24,710.63.

Q Did you earn money which shows up on your 1973 returns for services rendered in 1972?

A Yes, sir.

Q How much did you earn in 1972 but shows up in your 1973 returns?

A Well, I have the pension plan W-2 form that shows I was on vacation for a period -- for a sum of $1559.52.

Q Did you work in the latter part of 1972?

A Yes, sir.

Q When did you receive your earnings for the services in 1972?

A In 1973.

Q How much is that?

A Well, I'm trying to determine it but I think that it is --

THE COURT: It appears to me, Mr. Thaler, which I suggested some time ago, those exhibits are in evidence. It seems to me that the simplest way to get it before the jury is to take those things and tell the jury what they show in regard to earnings.

MR. THALER: I can do that, your Honor.

THE COURT: Why don't you do that instead of having Mr. Sheppard, require him to search through the records. You know what you are asking for. Read it to the jury, whatever these figures are.

MR. THALER: Your Honor, to weed out and show the carryover from year to year it is necessary to see the periods of employment of the plaintiff and that doesn't show on-- the periods of employment don't show on the W-2 forms.

At this time I would like to offer into evidence Plaintiff's Exhibit 6 for identification which is a record of the plaintiff's employment, and which is a document issued by the Department of Transportation of the United States Coast Guard, and it shows his employment through to October 3, 1974.

THE COURT: We just spent about 20 minutes going through this material. I didn't know you had the documents.

All right.

xx (Plaintiff's Exhibit 6 marked for identification)

MR. BARKAN: No objection.

MR. THALER: At this time, your Honor, I would like to offer Plaintiff's Exhibit 6 for identification into evidence as Plaintiff's Exhibit 6.

THE COURT: All right.

x (Plaintiff's Exhibit 6 received in evidence)

Q Mr. Sheppard, the document indicates that you were employed on the Santa Ana --

THE COURT: I'm sorry. I don't really understand where we are. Mr. Sheppard has just gone through that. I'm not going through that again.

MR. THALER: This is relating to his wages, your Honor.

THE COURT: I don't care. You get his wages into evidence. You have his tax return. Get that into evidence. We don't have to go through his employment to get his wages. You introduced his tax returns for various years to show how much money he made.

I told you to read what that discloses to the jury since they are in evidence.

Let's do that.

MR. THALER: Before that, may I ask one question, your Honor? It is just short.

THE COURT: Sure.

Q When do you get paid, at the termination of a voyage, Mr. Sheppard?

A Yes, sir.

Q And ~~if you~~ get paid in 1973, that goes to your returns in 1973, is that correct?

A Yes, sir.

MR. THALER: Mr. Sheppard's tax return shows for 1973, $27,746.59.

For 1974, $20,406.19.

THE COURT: Are those figures for his earnings as an engineer on board ship?

MR. THALER: As an engineer on board ship.

THE COURT: All right. Fine.

MR. THALER: Mr. Sheppard's 1975 returns, your Honor, ladies and gentlemen of the jury, have not been made out yet. We have his W-2 forms.

THE COURT: What do they show?

MR. THALER: Should I read them, your Honor, or--

THE COURT: Yes, read what it is and then maybe you can do the arithmetic. You can put the numbers on the board and add them up if you want to. The whole purpose of this is to find out how much he made on the ship during the year 1975.

THE WITNESS: Your Honor, could I mention something?

THE COURT: No, not now. You allow Mr. Thaler to take care of the examination, Mr. Sheppard.

MR. THALER: Your Honor, if it please the Court, I think Mr. Sheppard can do it better than I can.

THE COURT: You can't read the numbers?

MR. THALER: I have always had problems with W-2 forms.

THE COURT: All right.

THE WITNESS: This is not all of them. You have the yellow sheets. That's what I wanted to say.

THE COURT: Mr. Sheppard, I hope you don't have as much difficulty getting the money as you are finding out how much you made.

THE WITNESS: Do you want me to give you the dates?

THE COURT: Give us the figures for 1975, the gross on-board earnings.

A $2,509.22

$3,120.78.

$4,716.35.

$4,582.29.

$4,620.80.

16.51.

6.08.

8.58.

40.64.

72.03.

20.28

$9,703.90

Q The $9,703.90, what does that represent?

A That's vacation pay.

Q Is that for the year 1974 and 1975?

A Yes, sir. Part of 1973.

Q Part of 1973, too?

A Yes, sir.

MR. THALER: I have no further questions, your Honor.

I will compute that and give the total figure to the jury, your Honor.

THE COURT: All right, Mr. Barkan, do you have some questions?

CROSS-EXAMINATION

BY MR. BARKAN:

Q Mr. Sheppard, when you joined the S.S. Lash Turkiye, who did you report to on that vessel?

A The chief engineer.

Q What was his name?

A George Joseph.

Q Did Mr. Joseph give you any instructions?

THE COURT: Obviously he must have of some kind.

A Later on he did. Not right then.

Q Did he take you through a tour of the engine room?

A No, sir.

Q Did he give you any indication of what your duties would be aboard that vessel?

* * *

Q Did you receive any documents at that time,a Master's Certificate?

A I received a little statement that I had written and signed.

Q Is this the normal procedure aboard a vessel after an accident is reported to the chief mate or yourself as first assistant engineer, to report to the chief engineer?

A Yes, sir.

Q Is it then a normal practice aboard vessels for some kind of report to be made out?

A Yes.

Q This is true for all vessels, is it not?

A Should be.

Q Mr. Sheppard, when did you first got to sea?

A It was in 1942.

Q In what capacity were you aboard that vessel?

A Training capacity in the maritime service.

Q Training for what?

A For an engine room personnel.

Q Was it 1944 you told us you received a license?

A Yes, sir.

Q What license was that?

A Third assistant.

Q Did you ever upgrade that license?

A Yes, sir.

Q What license do you presently hold?

A Chief engineer, steam and diesel.

Q Chief engineer for steam and diesel?

A Yes, sir.

Q When did you obtain this chief engineer's license?

A I obtained the chief engineer's steam license about, approximately eight years ago.

Q Is this the same license that Mr. Joseph holds?

A Well, it isn't really the same one but it is the same thing.

Q In other words, you are licensed to sail as the chief engineer just as he is?

A Yes, sir.

Q When did you obtain your license as a chief engineer for diesel vessels?

A About a year or a year and a half ago.

Q Prior to this incident on April 9, 1973, did you ever sail in any other capacity other than first assistant engineer?

A Yes, sir.

Q What other capacities?

A I have sailed as third and second.

THE COURT: I don't understand what this has to do with your case.

MR. BARKAN: Your Honor, he is claiming a disability from not being--

THE COURT: What difference does it make what he did before? He claims his disability is subsequent to April 9.

MR. BARKAN: He is claiming, as I understand it, he hasn't been able to work in the capaity of first assistant engineer and that his earning ability -

THE COURT: He is complaining that he hasn't been able to work in that capacity because under his theory he can't do the heavy work.

I don't see what he did before is going to help your case.

MR. BARKAN: I think it is important, your Honor, because of the scarcity of records relating to his present condition and since it was brought out by the plaintiff's attorney --

THE COURT: I don't see any basis for it before April 9. You may ask him what he did afterwards,but I don't see how you can raise any problem about what he did before April 9, as I believe that's the date of the accident.

MR. BARKAN: Yes, it is, your Honor.

Q As I understand it, Mr. Sheppard, after you were marked fit for light duty on May 2, 1973 -- is that correct?

A I think so. I'm not quite sure of the date but that sounds reasonably close.

Q Did you attempt to obtain employment after that date?

A Not immediately.

Q When did you first attempt to obtain employment after that date?

A I think the first day I went to work was June 22.

THE COURT: That is not what he asked you.

He asked you when did you attempt to get employment, not when you went to work.

THE WITNESS: I think that's the first time I attempted to go to work.

Q Isn't that in fact the first day you did go to work?

THE COURT: I think you and he agree.

A Well, I want to say yes, but at the same time I might have taken a night job before but I don't think so. It doesn't show on my records.

Q Do you recall, Mr. Sheppard, providing us with testimony on December 10, 1974?

A Yes, sir.

THE COURT: What does that mean? Do you mean you took his deposition?

MR. BARKAN: I took his deposition, yes, sir.

THE COURT: Why didn't you say that? You sounded a little mysterious.

MR. BARKAN: Sorry.

Q Do you recall, to a question put to you, did you return to work --

THE COURT: Give him the page.

MR. BARKAN: Page 44, Line 18.

Q -- to the question:

"Q Did you return to work after receiving that fit for duty slip?"

And your answer was:

"A Yes, sir, I took a few night jobs."

A Well, it's been so long ago I can't say for sure but it is possible.

Q What did you mean by "night jobs"?

A Night relief jobs for ships in port.

Q How would you obtain these jobs?

A I would take them from the board in the union hall.

Q Would you have to apply some time in advance to obtain these jobs in the union hall?

A Sir?

Q Would you have to apply for these jobs in advance of the day that you would work as a night engineer?

A No, sir. It would be the same day.

Q Whenever you put your card in the hall for seagoing employment, would it be the same day?

THE COURT: I don't understand, what does all this have to do with your case?

A Ordinarily.

THE COURT: What does this have to do with your case? I really don't understand what purpose you are serving in these questions. If you want to show he was trying to get a job, that is fine. Why all the details?

Q When you went aboard, I believe you mentioned the New Yorker on returning to work, in what capacity was that?

A Second assistant.

Q Did you have any difficulty performing your duties at that time?

A No, sir.

Q And the next vessel you went on, did you have any difficulty performing your duties on that vessel?

A What was the next vessel?

Q The President Monroe.

A And when you say"difficulty," I believe you mean any problems?

Q Did you perform all your duties?

A I didn't do anyheavy lifting.

Q What do you mean by heavy lifting?

A I mean I didn't do any heavy lifting.

Q What do you consider heavy?

A In what respect, weight or something that is not light?

THE COURT: The point is, Mr. Sheppard, you said you didn't do any heavy lifting. It seems to me you ought to define what you are talking about.

A Well, it is kind of hard to define it in pounds. I can tell if I am lifting something that is too heavy before I even lift it and if I think it is too heavy I wouldn't even try. Or didn't on that occasion.

Q But you were able to perform the duties as first assistant engineer?

A I did perform the duties of the first assistant engineer.

Q And thereafter when you went on various vessels subsequent to the New York and you were aboard the vessel as

first assistant engineer, did you perform the duties of a first assistant engineer?

A I performed the duties but I don't think that I did the job that I should be doing. I don't think I was fully capable of fully performing the job.

THE COURT: That is not very helpful. You were employed as what, a first assistant engineer?

THE WITNESS: Yes, sir.

THE COURT: You performed that duty and got paid as a first assistant engineer, correct?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q When were you last employed, Mr. Sheppard?

A The 31st of March.

THE COURT: I think it is the 29th. I think your employment you said ended on the 29th of March if I am not mistaken.

THE WITNESS: Well, the employment on the American Ranger ended on the 29th but I was in the union hall on the 31st and I couldn't get a job. They couldn't get a night engineer for the African Neptune and they asked me if I would take it and I took it for eight hours.

Q What job did you have on the American Ranger?

A First assistant.

Q Is it true that most of the jobs that you have had after April 9, 1973 was that of first assistant engineer?

A Most of them, yes, sir.

Q And you received the wages as a first assistant engineer on those occasions?

A Yes, sir.

Q After being marked fit for light duty on May 2, 1973 were you ever marked not fit for duty as a result of your back injury?

A No, sir.

Q Did you ever lose any time from work because of your back injury or this injury after May 2, 1973?

A Yes, sir.

Q What date was that?

A One date was after I came off of the President Monroe.

Q When was that?

A Some time in July.

Q Of what year?

A 1973.

Q How long a period of time was that?

A That I didn't feel like I was fit for duty or didn't work, feel like --

Q That you didn't work?

A Well, I think I was off of work about 25 days but I didn't consider myself to be unfit for duty that entire length of time.

Q Did you have any doctor examine you and concur in that opinion?

A No, sir.

Q Any other times?

A Any other time what -- that I had a doctor concur?

Q No, any other times that you lost or believe you lost work as a result of this injury.

A Yes, sir. When I got off of the Azalea City as second assistant.

Q Was that in August 1974?

A I couldn't say for sure.

Q How much time did you lose at that time?

A I'd have to look at the records.

THE COURT: Don't you have a --

THE WITNESS: I think it is laying over there. It is marked as an exhibit and I don't have it.

THE COURT: I thought you had something before you to refresh your recollection.

MR. BARKAN: I have something. It appears he left the Azalea City on August 16, 1974 and went to work

on the New Yorker on September 6, 1974.

MR. THALER: Do you need this document to refresh your recollection (handing)?

Q How much time do you believe you were unable to work on that occasion?

A Well, I was off 20 days and in that 20 days I worked 14 days. When I got off of the Azalea City, I knew I couldn't do the work that had to be performed so I got off. I asked for relief.

Q Once again, did you receive any treatment from a physician at that time?

A No, sir.

Q Were you ever examined by a physician at that time?

A I don't know what dates I went to the Marine Hospital. I did go to the Marine Hospital on various dates.

Q When you went to the Marine Hospital on various dates, did you receive treatment for your back or did you receive treatment for other parts of your body?

A Both.

Q Did you ever have any injuries after April 9, 1973?

A Not serious. A couple of times I hurt my back. It was like a reoccurring injury. One time on the Green Wave.

Q What date was that on the Green Wave?

A Shortly after joining the ship.

Q Was this in October of 1973?

A Yes, sir.

Q How did you hurt your back on that occasion?

A Helping the cadet lift an armature into the lathe.

Q How heavy is this armature?

A About 60 pounds.

Q And you say you were helping a cadet. Was he holding part of it?

A Yes, sir.

Q Who was holding most of the weight, you or the cadet?

A I think I was holding most of it in the end.

Q Did you slip or he slip or anything happen at that time which caused the injury to your back?

A No, sir. Nobody slipped.

Q Did anything happen?

A No, sir.

Q Did your back just start to hurt?

A Yes, sir.

Q Were you bending over in a cramped position?

A No, sir. I was lifting up and reaching over.

Q You were reaching over?

A Yes, sir.

Q Were you unable to work after that occurred?

A I didn't lose any time from work.

Q After May 2, 1973 did you receive any treatment for your back at all?

A Well, yes, sir. I went back and got my prescriptions refilled for pain pills and things like that but other than that no.

Q What kind of pills were they?

A Pain pills. I think they were APC and codeine. Some of them were but I'm not sure all of them were.

Q Was that only for your back or was it as a result of some of the other injuries you mentioned you might have had?

A Well, when I had my teeth pulled I also had some pain pills given to me then but I am not sure what kind theywere.

Q Was your employment after April 9, 1973 as a relief engineer?

A Usually, yes, sir.

Q Would you tell us, please, exactly what a relief job is?

A A relief job is when somebody gets off for a

vacation or sickness or personal reasons and they call for a relief man from the union hall. Is that what you wanted?

Q Well, I am asking you.

A Well, there are two kinds of relief men.

Q Which type were you?

A Both types.

Q What was the other type, then?

A Like where I relieved the ship's engineers while the ship is in port.

Q That would be the night engineer that you described before?

A Port relief, yes.

Q But for seagoing employment, it would be the other type of relief where you relieved the engineer who is on vacation or whatever.

A Yes, sir.

Q Would this mean when the employment as a relief man or the other man comes back, you would lose your job?

A Ordinarily, yes, sir.

Q And then how would you go about getting another job?

A I would go back to the union hall and wait for another job to come on the board that I thought I could perform.

Q Were jobs plentiful?

A Yes, sir.

Q You could get a job any time you wanted?

A I wouldn't say that.

Q Do you get paid any money for the period of time that you were on vacation?

A Yes, sir.

Q How much vacation are you allowed per year?

A For a what?

Q Per year?

A They don't base it on per year. You get so much vacation per month.

Q In one given year how much vacation would you be entitled to?

A Well, it then again would depend on the type of ship --

MR. THALER: Your Honor, the plaintiff is going to present an expert on the wage structure of the maritime industry relating to engineers and if Mr. Barkan will wait until he arrives, he can get all that information from him.

MR. BARKAN: Your Honor, I think this type of information is actually personal to the plaintiff, how much vacation he was entitled to and not a matter of

what the --

MR. THALER: Vacation and wages is governed by the collective bargaining agreements between the union and the company, your Honor, and it is not related to the individual but it is related to the job. It is even related to the vessel.

THE COURT: Well, I think you can ask the question. I will allow you to ask him for a while. If it gets more obscure than clarified, we will stop it.

MR. BARKAN: I will ask it very directly, then, your Honor.

Q Mr. Sheppard, during the year 1973, after April 9, how much vacation time did you receive?

A Immediately after or combined?

Q From April 9th to December 31st, 1973.

A I do't know the exact number of days.

Q Was it more than a month?

A Approximately a month.

Q And you were paid for this vacation?

A Yes, sir.

Q Could you receive payment for vacation while you are actually working on a vessel?

A No, sir.

Q During the year 1974, the entire year, how many

days vacation did you receive payment for?

A I received none.

Q Not one day off?

A Not one.

Q Did you work the entire year?

A No, sir.

Q What periods of time were you off during the year 1974?

A From 1/31/74 to 5/10/74.

From 7/12/74 to 7/22/74.

And from 8/16/74 to 9/6/74.

And from 9/14/74 until 1 -- until the end of the year.

Q And was there any reason why you weren't employed during those periods of time?

A Well, some of the time I wasn't able to work. I didn't have any doctor's certificate.

Q Did you sustain any other injuries during that period of time or those periods of time prior to when you were not working in 1974?

A No, sir, not to my knowledge.

Q You mentioned that you had your teeth fixed. When was that?

A I think it was in 1974.

Q Did you go to sea during that period of time when you were getting your teeth fixed --

A I went to sea a few days on the New Yorker -- between dental appointments at the Marine Hospital.

Q Were you unfit for duty because of your teeth?

A No, sir.

Q Were you experiencing pain because of your teeth?

A Not a great deal.

Q Was it preventing you from working?

A I don't think it would have prevented me from working other than I would, sometimes I would have to be there for appointments.

Q In other words, it was inconvenient for you to work at that time?

MR. THALER: I object. The witness did not say that at all.

THE COURT: Objection is overruled.

A Repeat the question, please.

MR. BARKAN: Mr. Reporter.

THE COURT: Mr. Sheppard, I suppose with a rising inflexion it could be considered a question but it sounds more to me like a statement, but you may repeat it.

(Read.)

A What time?

THE COURT: Mr. Sheppard, he has been asking you the questions about the times when you were having your teeth fixed and you have been answering questions about that. That is the time he is talking about, when you did work while you were having your teeth fixed.

A No, sir, it wouldn't have been inconvenient.

Q Was there any other reason why you weren't working at that time?

A What time? 1974?

Q During this period of time when you were having your teeth fixed.

A I am not sure exactly what time I was having my teeth fixed.

Q I believe you mentioned after you left the SS New Yorker.

A That was just one specific instance. I said that I was having my teeth fixed part of the time when I was on the New Yorker.

Q Mr. Sheppard, getting back to the day of the accident, I believe you mentioned an emergency generator.

A Yes, sir.

Q What exactly is that?

A What is it?

Q Yes.

A It is a generator that starts automatically when the ship's power goes off.

Q Where is that generator located?

A Outside of the engine room about three levels up.

Q Three levels above the engine room?

A Yes, sir.

Q What is the function of this emergency generator?

THE COURT: He just told you. It starts automatically when the power goes off.

Q Does it provide power --

A It is to supply power when you have no ship's power.

Q Is this generator secured when the vessel is in drydock?

A It could be.

THE COURT: What does that mean?

MR. BARKAN: Is it turned off.

Q Was it turned off on April 9, 1973?

A I don't know.

Q Mr. Sheppard, your attorney elicited testimony as to the earnings from 1973 to the present. I just wanted to ask you how much you earned during the years 1972.

THE COURT: What relevance does that have?

MR. THALER: 24,000 --

THE COURT: Wait a minute. I asked a question as to what relevance it had.

MR. BARKAN: Your Honor, there was a claim for permanency here.

THE COURT: Why go back to 1972? I don't understand this. I had barred it from Mr. Thaler because I didn't see any relevance. Why do you think it is relevant?

MR. BARKAN: For the purpose of showing there was no loss of income during these years, the year before the accident or after.

THE COURT: Oh, I see what you mean.

MR. BARKAN: There is a claim for permanency in this.

THE COURT: All right, you can put it in.

MR. THALER: It is admitted in evidence as part of Plaintiff's Exhibit 5.

THE COURT: Was it read into the record?

MR. THALER: No. I wanted to and then the Court objected to that.

THE COURT: You can read it into the record.

MR. THALER: $24,710.63.

THE COURT: All right.

Q Mr. Sheppard, what is the slop chest aboard the vessel?

A Slop chest aboard a vessel is like a little company store where you buy certain articles.

Q Could you buy flashlights there?

A Sometimes you can.

Q Did you ever attempt to aboard the SS Lash Turkiye?

A No, sir.

MR. BARKAN: No further questions.

REDIRECT EXAMINATION

BY MR. THALER:

Q Mr. Sheppard, isn't it a fact that some time after you boarded the Lash Turkiye --

THE COURT: Mr. Thaler, this is your witness now. You are not to ask any leading questions or suggestive questions. Let him testify.

Q You brought the attention of the oil on the catwalk to the chief engineer, is that correct?

A Yes, sir.

Q Why did you speak to the chief engineer about the oil?

A Because I wondered --

MR. BARKAN: Objection.

* * *

things you already covered on direct.

MR. THALER: This was covered on cross examination, not direct, your Honor.

THE COURT: No, you asked him when he was ill. You covered that on direct. There is no point in repeating it.

MR. THALER: Yes, your Honor.

Q The first assistant engineer from time to time is required to work with heavy equipment, is that correct?

A Yes, sir.

THE COURT: What are you required to do? That is something I am confused about. What are you required to do with heavy equipment as an engineer that you are not able to do?

THE WITNESS: You are asking me?

THE COURT: I certainly am.

THE WTINESS Well, many times you have to lift pieces of machinery or equipment to move it into place or move it out to be repaired and it depends on the ship. On the Green Wave --

THE COURT: You do it or you can have people assist you do it?

THE WITNESS Yes, sir. On the Green Wave I had

nobody working with me but the cadet and two wipers. On the ship I recently got off of, I had six day men.

Q What does that mean?

A I had more help.

THE COURT: So as I understand your testimony, you can work as a first assistant engineer but because you don't have sufficient help, some particular job you wouldn't be able to do the job if you are required to move any heavy equipment, is that what you are trying to say?

THE WITNESS: Yes, sir.

Q Would it not only relate to using a lot of force to open valves?

A No, sir, I don't think so.

THE COURT: Again I am going to suggest that you not testify.

THE WITNESS: I could always use the wheel wrench.

THE COURT: Let me see if I can pursue that a little further so I can get it clear in my own mind. There are certain times whether or not you can stay on a first assistant engineer's job at sea depends upon whether or not you can have sufficient help, is that correct?

THE WITNESS: Yes, sir.

THE COURT: You have taken some jobs, as you have indicated, and if it gets to a point that you find

you don't have sufficient help to do some of the things that are required, then you leave the job, is that correct?

THE WITNESS: Yes, sir.

Q You were permanent on the American Ranger, were you not?

A Yes, sir.

Q That was the ship that you last sailed on?

A Yes, sir.

Q Did you change jobs on that ship?

A Did I change jobs?

Q Are you changing jobs on that ship?

A I don't plan to go back.

Q Why not?

A Because they have two men on there now who say they are not able to do heavy lifting either and I can't do it so I have asked for a transfer.

MR. THALER: I have no further questions.

MR. BARKAN: I have no questions.

THE COURT: I have some questions.

BY THE COURT:

Q When you were hurt on April 9th, did you go to the hospital? Were you hospitalized?

A I was not hospitalized. I was an out-patient.

Q You were treated by doctors?

A Yes, sir.

Q For how long?

A Well, for quite some time. Even after --

Q For how long, Mr. Sheppard?

For quite some time is kind of vague.

A It is vague.

Q I gather that you were an out-patient and you saw a doctor from time to time. How many times did you see a doctor?

A Well, I know I went to the doctor after I got off of the President Monroe.

Q No, I am talking about April 9th.

A Yes, sir, I know.

Q Did you see a doctor then?

A Yes, sir. April 9th. Not on the 9th. On the 10th.

Q How long were you under the doctor's care?

A I had unfit for duty until May 2nd.

Q That does not answer my question. How long were you under a doctor's care?

A On a day-to-day basis?

Q I suppose so.

A Well, I suppose until that day then.

Q Did you see a doctor between April 9th and May 2nd?

A Yes, sir. I think so.

Q How many times?

A One time.

Q One time after April 10th?

A Yes, sir, I believe so.

MR. THALER: Your Honor, if I may, the medical records --

THE COURT: You can introduce them --

MR. THALER: It has been. Parts of it anyway. Exhibit 3, Plaintiff's Exhibit 3.

BY THE COURT:

Q After that, whatever that time was in April or May that you saw a doctor, that is, for the condition you had, when had you seen a doctor since that time for your injuries?

A Mr. Thaler has a list of times I have gone to a doctor in the last year or so but I can't tell you the dates. I do know that I went to the Marine Hospital in Norfolk after I got off the President Monroe in July but I don't know the date.

Q Have you been declared unfit for duty at any time since May 2, 1973?

A No, sir.

Q Have you been hospitalized at any time since May 2, 1973?

A No, sir.

Q Those times that you would leave the ship because you felt that you couldn't do the work, did you go to a doctor?

A Not for that reason. If I went it was -- no, sir, I don't think so. I didn't go.

THE COURT: All right. Than you very much. You are excused.

(Witness excused.)

THE COURT: Call your next witness.

F R E D S C H A M A N N, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. THALER:

Q Mr. Schamann, what is your occupation?

A I am the Director of Research and Development for Marine Engineers Beneficial Association, District 1, Pacific Coast District.

Q Is that the organization of which Mr. Sheppard is a member?

A Yes.

Q What does your job entail?

A My job entails working actively during period of negotiations with the labor union in formulating the demands for our labor contracts and putting into effect the demands that we achieve through collective bargaining.

Q And in your capacity are you familiar with the rates of licensed marine engineers?

A Yes, I am.

Q Are you familiar with the -- can you describe what the wage structure is in regard to licensed engineers?

MR. BARKAN: I object to that, your Honor.

MR. THALER: I will withdraw that question.

Q What does the wage rate consist of for a licensed marine engineer employed on a vessel such as the vessels Mr. Sheppard has been employed on?

MR. BARKAN: I object because there were so many different vessels and probably different classes that the question is just too general.

Q Do you understand the question, Mr. Schamann?

THE COURT:The point is maybe he understands it. I am not sure --

MR. THALER: It is not clear enough.

THE COURT: I understand he was on some steam-powered and Diesel-powered --

MR. THALER: I am not talking about that. I am talking about.--

Q What do the wages consist of in terms of dates, overtime, vacation?

A You have just recited them. They consist of base wages, overtime payments and vacation pay.

Q For cargo ships are there certain wage structures related to licensed marine engineers who are employed on them?

A Yes.

Q Are you familiar with the wages of licensed marine engineers serving as first assistants from the period 1973 to the present?

A Yes, I am.

Q What is that wage?

A The wage would vary dependent upon the vessel that the first assistant is serving upon.

Q What is the range?

A The range in our current fleet or the fleet as of 1973 would range from a Class B vessel thorugh a Class A-4 vessel.

Q Do you know what the Lash Turkiye was?

A Yes. It is classified as an automated Class A-3 vessel.

Q What are the wages for a first assistant engineer on an annual basis on such a vessel?

MR. BARKAN: I object on the annual basis.

THE COURT: I can't he you.

MR. BARKAN: I object because he asked for it on an annual basis. I don't believe Mr. Sheppard's employment on that vessel was annually.

THE COURT: All right, I think that is probably right.

Q Do you have a list of Mr. Sheppard's employment record, Mr. Schamann?

A No, I do not.

Q On the Lash Turkiye, what is the average wage of a first assistant engineer employed on such a vessel on a monthly basis?

THE COURT: I think that is all right.

MR. BARKAN: I think if Mr. Schamann is testifying as an expert on the wage structure of the contract, it should be limited to that degree.

THE COURT: I don't understand. He has already identified the ship and I gather the class of the ship and the contract calls for certain wages on that class of ship, wouldn't it?

MR. BARKAN: I agree but he asked for an average of

engineers on that ship. I think that is different.

Q What are the earnings of a first assistant engineer such as Mr. Sheppard, who was employed on the Lash Turkiye for a month's period of time taking into consideration the employment on that vessel for 30 days?

A 30 days'earning on the current wage scale would be $4200.

Q That is per month?

Q Per month.

Q What does that consist of?

A That would consist of his base wages including his non-watch payment, overtime and vacation payments.

THE COURT: You were indicating the maximum that he could get. What is his base rate?

Q Mr. Schamann, what is his base wage?

THE COURT: That is what we ought to have.

A His base wage would be $$2,577.34 per month.

Q And what would be his overtime, can you describe how you arrived at the overtime rate?

A Would you readdress that question to me?

Q What would the overtime rate be and can you describe how you came to that figure?

A The overtime rate would be $17.43 per hour.

Q How did you arrive at a $4200 figure in

including the overtime?

THE COURT: That is not going to help us too much.

Q You have $2500 base, is that correct?

A Yes.

Q How much would be for vacation?

A $1,056.31.

Q Is there a guaranteed amount of overtime that a person such as Mr. Sheppard would have earned on a ship such as the Lash Turkiye?

A No.

Q How did you compute the overtime rate?

A Over the past ten years we have been using the economic guidelines set forth by the federal government to determine the amount of moneys we have to bargain with collectively. This requires us gathering payroll data from the contract companies and coming up with an average wage for the ship's engineers employed on the ship. Taking the average wage we then apply the amounts that were allowable under the guidelines in effect or laid out by the collective bargaining agreed to determine the amount of money that we had to spend for new benefits and then we would use this to purchase the various wage increses.

THE COURT: Mr. Schamann, you are talking

exactly like an expert. I don't understand a word of what you are saying. I have no understanding of this at all.

Q You gave us $17.40 -- may I could try to clear it up, your Honor.

THE COURT: The question is how you figured the overtime.

Q The overtime, is that set by the collective bargaining agreement?

A The rate is.

Q You gave us a lump sum figure for 30 days for overtime, is that correct?

A Yes, I did.

Q How did you come to the determination of that lump sum?

A By using the payroll data that was supplied to us, we were able to determine the percentage of base wage on various classes and types of vessels that could be allotted for this calculation.

Q And what percentage did you arrive at?

A 92.2 percent of base wages.

Q How much does that come out to in terms of dollars?

THE COURT: Actually, the figure he has given us

comes to a little less than $1100 according to my figures in terms of overtime, but I still don't think I understand.

Do you mean that on the whole on a ship like that, the way that you figure it out, the men would opt to work for that overtime so they make about $1100 roughly?

THE WITNESS: In that range,yes, sir.

MR. BARKAN: Your Honor, I was going to object to this whole line of testimony. I think it is speculative. Mr. Schamann mentioned allotted. We have the earnings records of Mr. Sheppard.

THE COURT: The issue Mr. Sheppard is phrasing is that he cannot make overtime. If he were in full health -- he is losing so much money per month. That's what he is trying to say. He is therefore losing this pay.

MR. BARKAN: But to speculate as to how much overtime is on one type of vessel, for instance, which was testified was an A-3 category and what it is aboard other vessels --

THE COURT: I am having some problem with the figures.

Q For example, on the Lash Turkiye, what are your figures based upon, Mr. Schamann?

A My figures on the Lash Turkiye are based upon

the base wages while he is working on board the vessel,the overtime while he is working on the vessel and the vacation payments which he would receive while he is not working on the vessel.

Q How was the 92 percent overtime figure computed in terms of the base wage?

THE COURT: 92 percent of -- overtime is 92 percent of the base wage?

THE WITNESS: Yes, it is, sir.

THE COURT: I don't see how that is arrived at. I thought you told me the base wage was $2,577.34.

THE WITNESS: The question was asked,what was the monthly earning that he would receive under the contract. The next question was on the vacation amount, when he is on vacation, he is off the vessel, he is not earning overtime while he is on the vessel, so the period that he is off on vac n he is not earning overtime so therefore the ratio of 92 percent would only hold for that period of time he is employed on the vessel.

THE COURT: I am absolutely completely lost. I thought that you indicated that on a monthly basis, the base pay was $2500, his vacation pay was 1500 some dollars. I thought that is how he arrived at the $4200 figure. Now I see I am wrong. I don't understand. I really don't understand it. Maybe you better start

again, Mr. Thaler.

Q You are familiar with the earnings of marine engineers on merchant flag ships as you stated, correct?

A Yes, I am.

Q And you work and negotiate with companies relating to their wages, is that not correct?

THE COURT: Well, we know all that. Try to give him a question that will clarify it for us.

MR. THALER: Mr. Barkan, would you care to stipulate to the overtime that Mr. Sheppard earned on the Lash Turkiye when he was working for your company?

MR. BARKAN: To the amount that he had earned, it would be in the records. I don't see any objection to that. To the amount that he would have earned, I object to.

MR. THALER: I don't understand. There is a question here on the amount of earnings of a first assistant engineer such as Mr. Sheppard on a vessel such as the Lash Turkiye in 1973.

MR. BARKAN: I think we are speaking about different things and different theories, which would be dependent upon --

THE COURT: I agree with that. That is not what we were talking about.

MR. THALER: I thought Mr. Barkan wanted me to specifically relate it to the Lash Turkiye --

THE COURT: We were talking about what he earned on the ship. You don't have to have an expert to tell us that. We know how much overtime he earned on the ship. We don't have to have an expert to tell us that. You have the records in terms of what he actually earned on the ship. You weren't having him for that, I didn't think. I thought you were having the expert to testify as to what kind of overtime would be allowable for a man of his category on the ship and how much money he could earn on overtime.

MR. THALER: If I start in another vein, maybe I can get that out.

MR. BARKAN: Your Honor, that kind of testimony, I think, would be highly speculative because we are working with different companies and averages as opposed to what a man could have earned, what the conditions are on the ship --

THE COURT: You may be right but the issue that's been raised is that this man says that he has been damaged to the point that he cannot work on overtime. We all know that merchant people do do some overtime. My problem is I don't know how we will be able to reach the

formula under the present explanation. Maybe we won't. Mr. Thaler can try. If you find it too speculative, raise your objection. I probably will sustain it if it is too speculative.

MR. BARKAN: Thank you, your Honor.

Q Are you familiar, Mr. Schamann, with the average wages of first assistant engineers on an annual basis such as Mr. Sheppard working on merchant ships under contract with the MEBA?

A Yes, I am.

MR. BARKAN: Your Honor, I object to that question. He specified that relief engineers in taking relief employment as Mr. Sheppard testified that he was doing.

MR. THALER: That has nothing to do with this.

THE COURT: The objection is sustained. You should reframe the question.

Q Are you familiar with the hiring practices of Marine Engineers?

A Yes, I am.

Q Can you explain how a marine engineer is hired and how he obtains a job?

THE COURT: What has that got to do with this case?

MR. THALER: Well,your Honor, it has to do with the entire wage structure because it makes no difference whether or not a man is a relief or a permanent on a ship.

THE COURT: We don't have to go through that. If that is so, Mr. Thaler, you can ask this man does it make any difference and get it out. Why do we have to go through it that way. Ask him a simple question.

Q Does it make any difference in terms of pay, Mr. Schamann, in terms of pay within which a marine engineer, in terms of wage structure, whether he is a relief or a permanent aboard ship?

A The relief engineers and the permanent engineers for the same grade receive the same pay.

Q They are under the same contract, is that not true?

A That is correct.

Q What Mr. Sheppard may do today --

THE COURT: He has answered the question.

Q A man who will sail relief may from time to time sail on different class vessels, is that not correct?

A Yes, that is correct.

Q And different class vessels may have different wage structures, is that correct?

A That is correct.

Q What are the different class vessels that a relief may sail on in cargo ships?

A The different classes of vessels would range for pay purposes from Class B vessels to Class A-4 vessels. The breakdown of the classes are A-4, A-3, A-2, A-1, A and B.

Q What is the wage basis for first assistant engineers on these class vessels?

A The basis is the amount that is negotiated in the collective bargaining agreement.

Q Did you at my request make out the wages of a first assistant engineer for a year's period of time?

A Yes.

Q What did you base your computations on?

A The wages that were in effect at that period of time. The vacation benefit that was in effect at that period of time and an overtime factor that was derived from the Lash vessels' payrolls for first assistants.

Q In making that determination what class of vessels did you consider in coming up with the figures?

A I used one class of vessel, that being the automated A-3 vessel.

Q Is the Lash Turkiye such a vessel?

A Yes, the Lash Turkiye is an automated Class A-3 vessel.

Q Are there any automated Class A-3 vessels? Are there more than one?

A Yes, there is more than one.

Q Approximately how many?

A I would venture a guess at 30.

Q So if Mr. Sheppard left the Lash Turkiye, which is a Class A-3 vessel, it is possible that he could go on another ship of a different company of a different name which is also a class A-3 vessel and receive the same wages, is that correct?

MR. BARKAN: Objection, your Honor. I think we are getting very speculative on this. We know which vessels Mr. Sheppard was on.

THE COURT: Why did you pick Class A-3 vessel to make your computation?

THE WITNESS: I was requested to do so.

THE COURT: Just requested on a Class A-3 vessel?

THE WITNESS: Yes.

THE COURT: Let's hear the names of some of these vessels. You have the names of the vessels the plaintiff worked on.

MR. THALER: The President Monroe.

THE COURT: What was that?

Q Tbe Azalea City, the Green Wave?

A The Azalea City is a Class B vessel.

Q The Green Wave?

A I would have to look at my listings. I have listings of all the listings in the contract.

THE COURT: Name some off the top of your head. Name some vessels he has been on.

And you don't have your book here, I take it?

THE WITNESS: No, sir.

THE COURT: You probably will be with us tomorrow.

I thought Mr. Sheppard had a sheet of paper that listed every place he worked.

MR. THALER: Since '73.

THE COURT: Aren't you interested in that? What are you trying to find?

What I want to ask him is is that sheet of paper, whatever it was that Mr. Sheppard used to refresh his recollection that supposedly he was reading from, it had every ship he worked on. There is no point in wasting time. Get that sheet and ask him about those vessels.

MR. THALER: With all due respect, your Honor, that is only for '74 and on. The other is from the United States Coast Guard --

THE COURT: Let us get from '74 on. He will be here tomorrow. Let us find out whether he knows something about those.

Do you recognize any of those, what class they are in with any certainty? Otherwise we will have to suspend the questioning for tomorrow.

THE WITNESS: Yes, I do.

THE COURT: Tell us some of them.

THE WITNESS: The New Yorker is a Sea-Land vessel, diesel, and it is in a class -- it was recently reclassified to a diesel Class C.

The Azalea City is a Class B. The rest -- the Green Wave and the President Monroe I would have to refer to my vessel book.

THE COURT: All right. I am going to sustain the objection. I don't see any basis of our using a Class 4 vessel when he is not necessarily going to be employed on that and his record doesn't show he was employed on -- I am sorry, on the class A-3 vessel.

MR. THALER: The problem I have, your Honor, is that but for an accident a relief engineer, say he is a

first assistant --

THE COURT: Mr. Thaler, you ask further questions. I am not interested in your editorializing before the jury.

MR. THALER: May I approach the bench?

THE COURT: No. What you may do, Mr. Schamann, I am sure you will have to be back tomorrow, is to look up all of the ships from 1973 that Mr. Sheppard worked on and give us -- be prepared to tell us what class vessels they were.

On the basis of what they have I will make my ruling as to whether I am going to allow you to testify what he could earn on a Class 3 vessel.

THE WITNESS: Yes, sir.

Q Mr. Schamann, has there been any increase in wages since 1973?

A Yes, there have.

Q What have the increases been since that date?

A Since --

MR. BARKAN: Objection, your Honor. Once again we have to get specific.

THE COURT: Let's hear what he says. I don't know where we are going.

A We have practiced across the board wage increases,

across the board meaning that we have applied the same percentage of wage increases to each class of vessel in our collective bargaining agreements. Since '73 -- as of September 1974 we took the 8 percent wage increase. June 16, 1975, we took a 10 percent wage increase.

THE COURT: You are under the 1975 contract now?

THE WITNESS: Yes.

THE COURT: You have had an 18 percent wage increase since 1973?

THE WITNESS: Yes, sir.

Q When is the 1975 contract scheduled to terminate?

A In 1978.

Q Do you have an opinion based upon your experience in the industry as to whether or not a further increase is in the future??

MR. BARKAN: I object to that.

THE COURT: I will sustain that objection.

Q Mr. Schamann, for approximately the past ten years how many increases have been contracted between the companies, such as the ones that Mr. Sheppard has worked for?

A In wages there has been an increase in each of the contract years for the past ten years.

Q How many different contracts have there been for the past ten years?

A Three.

Q You referred to before, I believe, a non-watch rate. What is a non-watch rate?

A Non-watch rate for a first assistant's wage is part of the base wage and it consists of an amount given in lieu of extra compensation for weekends spent on board by a ship's engineer.

Q Are you familiar with the vacation benefits to marine engineers in 1973?

A Yes, I am.

Q In 1973 what were the vacation benefits?

A The vacation --

MR. BARKAN: Objection, your Honor. I think it is just too general unless we are talking about the particular vessels again.

THE COURT: I suppose that is right. Aren't the vacation pay geared to the type of vessel?

THE WITNESS: The benefits, there are three separate and distinct types of benefits.

THE COURT: Tell us what they are.

THE WITNESS: There is a tanker vacation plan and a dry cargo plan. On dry cargo we have

provisions for regular dry cargo vessels and high productivity vessels called quick turn-around vessels, we have a separate vacation plan.

Q For dry cargo vessels, what is the vacation --

THE COURT: What is a dry cargo vessel?

THE WITNESS: A dry cargo vessel is a vessel that will carry goods in bulk commodities.

THE COURT: Is that the ship that he was on, is that classified as a dry cargo vessel?

A The Lash Turkiye is a high productivity vessel called a container vessel or a quick turn-around vessel.

THE COURT: What is the vacation plan for that?

THE WITNESS: In 1976 the vacation benefit was 19 days vacation for every 30 days employment.

TEH COURT: That is what it is now?

THE WITNESS: Yes.

THE COURT: I think he asked for '73?

THE WITNESS: The benefit in 1973 was 16 days dry cargo vacation for 30 days employment.

Q That increased since 1973, is that right?

A It has.

Q What have the increases been?

A The curren vacation benefit is 19 -- correction. The current benefit is 18 days for 30 days employment.

Q Is there a schedule for 1976?

A Yes.

Q What is that?

A As of June 16, 1976 the benefit will be 19 days for 30 days employment.

Q Is there a schedule for 1977?

A Yes, there is.

Q What is that?

MR. BARKAN: I object, your Honor.

THE COURT: It is part of the contract. That is not speculative. It is part of the contract.

A The benefit in 1977, as of June 16th,will be 20 days vacation for 30 days employment.

Q What does that mean, 20 days vacation for 30 days employment in terms of money?

A During his period of vacation he will receive his base wages including non-watch payment.

Q So in other words, for every 30 days he works, he receives presently 19 days of vacation, is that correct?

A No.

Q I don't understand it and I am sure the jury doesn't. What does it mean?

A It means he will receive 18 days vacation.

Q And the 18 days will be with pay, right?

A Yes.

Q And the pay of that 18 days is based upon what?

A His base wages including his non-watch payments.

Q Mr. Schamann, are there jobs presently available for first assistant engineers?

A Yes, there is.

Q Is there a mandatory retirement age for marine engineeers?

A No, there is not.

Q In other words, a marine engineer can work past 65 or whatever, depending upon his disposition, is that correct?

A Yes, it is.

MR. THALER: Your Honor, other than the information concerning the different classes, I have completed my examination of Mr. Schamann. I would like to recall him again tomorrow morning.

THE COURT: Well, Mr. Barkan has to have an opportunity to cross examine him.

MR. BARKAN: I would prefer to wait until we finish his direct examination.

THE COURT: He is through except for one area. You can examine him on anything that has been raised up to now.

Tomorrow you can cross examine him on anything that Mr. Thaler directs him on.

CROSS EXAMINATION

BY MR. BARKAN:

Q Mr. Schamann, how many years have you been employed by the Marine Engineers Beneficial Association?

A 15 years.

Q Were you always employed in the same capacity?

A No.

Q When did you first become employed in this particular capacity?

A In 1964.

Q Do your duties normally relate to statistics or does it actually relate to the bargaining and negotiations?

A Both.

Q These figures you were mentioning, they are based entirely on statistics, are they not?

A No.

Q What then are they based on other than statistics?

A The payroll data.

Q For what period of time, this payroll data?

A For the Lash vessels I believe four and a half months.

Q And for the other vessels?

A Up to nine months.

Q I thought, if I understood correctly, you mentioned something about ten years before.

A You have asked me for the latest figures. I gave you the basis for deriving the latest figures.

Q How long have you been actually computing these types of figures?

A Since 1965.

Q And Lash vessels?

A Lash vessels, since 1972.

Q This A-3 category which includes Lash vessels, does it include any other types of vessels other than Lash?

A Yes.

Q Of this group you say there are 30 vessels?

A Approximately.

Q Is this the highest wage paying group of vessels?

A The Class A-4 is the highest wage paying vessel.

Q What kind of vessels are those?

A Those are the Sea-Land SL-7 class vessels.

Q And A-3 would be the next highest?

A Yes.

Q And it goes all the way down to B, which is the

lowest or is there lower than B?

A B at the present ime is lower although we do have a Class D with a 10 percent which would be higher than a normal Class B.

Q You also mentioned something about a diesel C. How does that fall into this classification?

A That is above Class B because diesel has a 10 percent bonus on it so we pay the higher wage rate on that particular vessel.

Q In computing these figures and coming out with the figure you gave us, at least for Lash vessels, this was from all the vessels in the A-3 category whether or not they are Lash, is that correct?

A No. The figures that I used for A-3 for determining overtime was specifically from Lash.

Q Was it related to any one company for Lash vessels?

A Yes, it was Prudential Lines that supplied me the payroll today.

Q This was the only one?

A Yes.

Q The overtime rate you testified to, this was computed from an average, was it not?

A The rate I testified to was the exact rate that

is currently in the contract.

Q 92 percent or are you speaking of the rate of $17 per hour?

A I am speaking of the rate of $17 per hour.

Q This percentage you used to come up with your figure of the monthly earnings, how was that derived?

A That was taken from payroll records on the Lash vessel.

Q Just one Lash vessel?

A That is correct.

Q Which vessel?

A The Lash Italia.

Q So then the other Lash vessels could vary, could they not?

A Yes, they could.

Q Wouldn't the amount of overtime that a first assistant engineer would earn depend on how often his services would be required for repairs?

A Partially.

Q Other engine room jobs?

A Yes, sir.

Q Do you know if there was anything that would be untypical about the Lash Italia from which you took these statistics?

A This payroll data was volunteered by the company as typical of their fleet.

Q Do you have this data with you?

A No, I do not.

Q You say it was volunteered as typical of the fleet?

A Yes.

Q Yet it can vary from vessel to vessel?

A It can.

Q Wouldn't it also vary from month to month, the amount of overtime that would be earned?

A It may.

Q You looked at the statistics, is it the same or the data that came in, is it the same every month?

A No, it would vary.

Q So then you can't tell exactly how much overtime a first assistant engineer would earn in any one month?

A I cannot exactly.

Q Isn't it true that the only figure that is -- the only figure that remains the same would be the base rate?

A For that period in the contract, yes.

Q Everything else would be a variable?

A No. The vacation would remain constant for that period of the contract.

Q But then that would vary from vessel to vessel, would it not, of different classes?

A No, that would vary by different types of vessel.

Q The classification of the Lash Turkiye, I believe you said in and out container vessel, is that correct?

A It is a high productivity vessel. It is a barge carrying vessel.

Q Is this the highest rate of vacation pay on this class?

A No. The tankers are a higher rate of vacation pay.

Q But of cargo carrying vessels other than tankers, would it be the highest?

A Yes, it would be the highest.

Q For a first assistant engineer to obtain this vacation, he has to not work, is that correct?

A That is correct.

Q When you say vacation pay, this is actually payments made to the union, is it not?

A No, it is not.

Q Who is it made to?

A It is made by a joint employer-union plan that is independent of the union.

Q When is it actually paid to the first assistant engineer?

A When he leaves his shipboard employment.

Q Can a first assistant engineer work 12 months in one year?

A He can work up to 12 months in one year.

Q And then he would receive vacation, I believe you mentioned it was up to 18 days for every 30 days he worked?

A Yes, he would receive that in addition or he would receive that once he had put his year's service in, he would then go on vacation.

Q Would he actually have to take his vaction to receive the money?

A Yes, he would.

Q So then, an engineer in order to take advantage of these vacation payments, he would actually have to stop working?

A He is required to stop working.

Q When is he required to stop working, any particular period of time? Can he work constantly and save it up?

A I believe we just had a change in the rulings when it is compulsory to take vacation. I would have to refer to the change in the rulings.

Q What was the old ruling?

A The old ruling, I believe, was 270 days of ship-board employment and then he is required to take his vacation when the vessel comes back to the States.

Q So that would be somehere around nine months?

A That is correct.

Q And now you changed the ruling to a longer period of time?

A I would have to refer to the ruling.

Q In any event, in any one year, at least up until this change of the ruling -- when was that made, that change in ruling?

A I believe at the last trustee's meeting.

Q Which would have been when?

A I believe in February this year.

Q So prior to that time in any given year the engineer could only work a maximum of nine months,am I understanding you correctly?

A That is correct.

Q And does he have to take the three-month vacation in one straight lump,so to say?

A Yes, he does.

Q Could he take five days here between vessels?

A No.

Q He has to use up all his vacation at one time?

A That is correct.

Q And would it always be three months at a time or is there some other breakdown?

A No, he may take his vacation any time after 30 days but he can't take it at random. He has to clean it up all the time. He has to take all his vacation that he has accumulated.

Q In other words, he can work 30 days, at least for this particular vessel, he can take off for 16 days under the older rates and then he can go back to work after 16 days, work another 30 days and take off 16 days and do it that way?

A Yes.

Q As long as he uses up all the vacation he accrued?

A Up to a maximum of three times.

Q What do you mean a maximum of three times?

A Well, rather than work 30 days and take off 16 days and work 30 days and take off 16 days throughout the year, we discourage, because the employers have requested us for purposes of their operation to reduce his option of taking vacation to a maximum of three times a year.

Q So other than that limitation a man is free to do

what he wants with his vacation time?

A Yes.

Q This particular incident occurred in 1973. How many American flag vessels of the dry cargo type were there in 1973 which were under contract to your union?

A I couldn't answer you.

Q How many members did your union have during the year 1973?

A Approximately 6,000.

Q How many of those members were trying to get jobs as first assistant engineers?

A I couldn't answer you that.

THE COURT: I think we better suspend now. You can resume tomorrow morning.

You are excused until tomorrow morning at 10:00 o'clock.

(Adjourned to Tuesday, April 13, 1976, at 10:00 a.m.)

F R E D S C H A M A N N, resumed.

THE COURT: I think we can save ourselves a great deal of time. I have thought over this issue and I am going to allow Mr. Schamann to testify as to any change in salary or compensation for only one cagegory. He can give us all of them or he can give us none of them.

MR. THALER: He is going to give us all.

THE COURT: All right.

DIRECT EXAMINATION (Continued)

BY MR. THALER:

Q Mr. Schamann, at my request did you check the earnings for the various categories on which Mr. Sheppard sailed in regard to the ships that he sailed on?

A Yes, I did.

Q Can you tell us what the categories are and under each category what the monthly earnings of a first assistant such as Mr. Sheppard is from 1973 up until the present and as set forth in the schedule in the collective bargaining agreement?

A I have employment on five vessels, the first being the Azalea City, which is a quick turnaround Class B vessel. On this vessel he was employed as first assistant. His earnings, he worked on this vessel between 1973 and currently, would be as follows: 1973, he would have

worked a total of 275 days earning $22,480 for the year.

1974, he would have worked a full year earning $30,872.

1975 working a full year as first assistant he would have earned $34,088.

1976 working a full year as first assistant he would have earned $36,147.

1977 working a full year he would have earned, based on the contract, $37,666.

MR. BARKAN: Your Honor, I am going to object. This whole line of testimony even gets more speculative. The witness has testified to earnings if he worked on that vessel a full year. Now, his record indicates he left that vessel, went on to other vessels and --

THE COURT: I understand that but that is the only way we can make any sense of the figures. We have to find out what the possibilities are,so the objection is overruled.

All right, proceed.

A The next vessel or type of vessel he had worked on on was the American Ranger which is a Class A-1 vessel plus 10 percent. It has a standard dry cargo vacation.

In 1973 working 9 months as first assistant on

this vessel, he would have earned $22,041.

Working a full year as first assistant in 1974 he would have earned $30,420.

As first assistant working the full year of '75 he would have earned $33,684.

Working the full year 1976 his earnings would be $35,797 and based on the contract his earnings for a full year's employment as first assistant in 1977 would be $37,380.

The vessels Green Wave, the President Monroe and the New Yorker I have not ascertained numbers as to the ratio of overtime to base wages until this morning and using the basis of 91 percent overtime to a base wage ratio I can offer the following figures with a few calculations:

On the SS New Yorker his earnings for 275 days in 1973 would be $23,295.

His earnings as first assistant for the year '74 would be $32,949.

As first assistant in 1975 he would earn $35,073.

In 1976 he would earn $37,206 as first assistant.

And as projected by the contract for 1977 as first assistant he would earn $38,777.

Q Is that it?

A No, one more.

The President Monroe, which is the same size vessel as the Lash Turkiye, an automated A-3 quick turn-around vessel, he would earn the following:

In 1973 as first assistant he would, for 275 days, earn $37,806.

In 1974 as first assistant he would earn $41,199.

In 1975 he would earn $45,261 as first assistant.

In 1976 he would earn $48,247 as first assistant.

And as projected by the contract in 1977 as first assistant he would earn $50,164.

Q Does that complete the ships --

A I had one additional vessel, the Green Wave which was a Class A dry cargo vessel for which I was unable to acquire a proper sampling of overtime to base wage ratio. Therefore, I had not performed the calculation on this class vessel.

Q On the vessels that you have described, what do the earnings consist of?

Q The earnings consist of his base wages, his overtime and his vacation payments.

Q What percent of his base wage is overtime?

A 91 percent.

Q What is meant by vacation?

A Vacation is a benefit that is paid to our members as compensation for him not receiving his weekends, his holidays or his evening off while employed on the vessel.

MR. THALER: I have no further questions.

CROSS EXAMINATION

BY MR. BARKAN:

Q Mr. Schamann, these figures you just gave us, these would be for a man who was steadily employed in each of these vessels?

A Yes.

Q Would a relief engineer earn that amount in one year?

A He may.

Q But a relief engineer would be required to get off the vessel and then seek a job on another vessel, would he not?

A Yes.

Q What was the average period of time between obtaining employment for a first assistant engineer once he left the vessel and seeking another vessel?

A I couldn't answer that.

Q Wouldn't that be quite relevant in determining the

wages of Mr. Sheppard?

A His individual earnings, yes.

Q So then these earnings that you have given us don't really apply to him, do they?

A If he works the entire year.

Q If he doesn't work the entire year, they do not apply to him?

A Then they would be proportionately less if he worked less.

Q And being a relief man, would he work less?

A That would be dependent. If he was a relief man employed by the company relieving on their vessels, he may acquire a full year's work.

Q Well, is the vessel New Yorker and the vessel Lash Turkiye vessels in the same company?

A No, they are not.

Q How about the vessel President Monroe and Azalea City?

A They are not.

Q How about the President Monroe and Azalea City?

A They are not.

Q And the Green Wave, is that in the same company with any of the others?

A No, it is not.

Q So then there would be a period of time between his obtaining employment on the other vessel?

A There may be.

Q In which case these figures would be lowered?

A Yes, they would be.

Q And you have no statistics as to how much lower they would be?

A No, I have none.

Q When Mr. Sheppard was on the New York, do you know if he earned more or less than the amounts you arrived at in your average?

A I do not know.

Q So he could have earned more at that time than you have stated in your figures?

A He could have.

Q And this would be dependent upon the actual period of time he worked and his payoff for that period of time?

A Those are the prime factors.

Q And you have no knowledge of what they are?

A No, I do not.

Q So am I correct in stating that these figures that you gave us have very little relevance to his actual earnings or potential earnings?

A They are related.

Q How relevant are they?

A Depending on how much he worked that year.

Q Without knowing that, then you can't provide figures, am I correct?

A That is correct.

Q How many members do you have in your union at this time?

A I would say approximately, as seafarers, approximately 6,000.

Q What are the others that are not seafarers?

A Well, they are affiliates such as air traffic controllers,research scientists, public service employees.

Q 6,000, are they all marine engineers?

A No.

Q How many marine engineers do you have you in your union at this time?

A About 5500.

Q How many of these marine engineers are employed as first assistant engineers?

A I couldn't accurately tell you that.

Q Do you have a lot of jobs avaiable for first assistant engineers?

A We have jobs available through the hall for first

assistant engineers.

Q How long a wait is it for those jobs?

A Depending on the job. A choice job may be a long wait. A job that is readily available could probably be gotten in very few days.

Q How many billets as first assistant engineeer do you presently have in your union?

A I couldn't accurately tell you that.

Q Do you know how many you had during the year 1973?

A I would be guessing at that.

Q Do you know if you had more jobs or less at this time than you had in 1973?

A We have fewer jobs today.

Q You have less jobs?

A Yes.

Q Do you have more members or less at this time than you had in 1973?

A We have fewer members.

Q How many fewer members?

A As marine engineers? I would be guessing around 750 to a thousand.

Q So you had about 6700 in 1973?

A Approximately that range.

Q Would it be unusual for an individual to wait 15 days for a job as first assistant engineer?

A By 15 days do you refer to in excess of his vacation time or between ships.

Q Between ships.

A No. It would not be.

Q If the man obtained a job, then, for one month, he would have to wait another 15 days to obtain another job thereafter?

A He may or may not.

Q But it is entirely possible?

A It could happen.

Q In which case his wages would be significantly below the figures you have stated?

A It would be lesser.

Q Do you have any statistics as to the average earnings of the members of your union?

A No, I do not maintain them on individual members.

Q Yesterday you provided some figures for the Lash Turkiye and if I understood you correctly, those figures were obtained for earnings in the last three or four months?

A I supplied a range of figures, I believe from

'73 through '77 for the Lash Turkiye.

Q I was under the impression you came out with a figure of about $4200 which you told me you obtained by a computation based on the Lash Italia for the last four and a half months.

A I came out with a current wage level as an example.

Q So in 1973, then, when Mr. Sheppard was actually on the Lash Turkiye, this figure would be about 30 percent below that, would it not?

A No, it would not.

Q Well, wasn't there an increase in June of '73?

A There was an increase in June of '73. There was an increase in June of '74. Correction, there was an increase in September of '74.

Q How about 1975?

A And there was an increase in '75.

Q I believe you testified yesterday that these increases were about 8 to 10 percent each year?

A I testified on two years. One was in '74 and one was in '75.

Q What was the increase in '73?

A '73 it was 6 percent.

Q 6 percent. So then we are speaking about a

24 percent reduction.

A 24 percent.

Q To April of 1973, the period of time that Mr. Sheppard was not -- was marked not fit for duty?

A No, we are not because you are speaking of wages when you say 24 percent. We were addressing ourselves to total earnings. He may have gotten a wage increase and by taking the vacation increase we may have changed that 24 percent number slightly.

Q And at the same time since the ship was newer, overtime would have been less and it wouldn't be 92 percent but maybe 80 percent; is that correct?

A No. Generally on a newer ship for the first half -- the first half year, the first year generally overtime is higher because they are shaking out the bugs in construction of the vessel.

Q Was the Lash Turkiye one year old in 1973?

A I do not have the date of construction for that vessel.

Q Am I correct, then, in stating that you don't have any figures for 1973 for the Lash Turkiye?

A I do not have any payroll figures for the Lash Turkiye. I do have the wage figures for the -- the basic wage figures and the vacation benefit figures for

the Lash Turkiye.

Q Wouldn't the best way of determining how much an individual would earn in overtime on any given ship be the amount he actually received in overtime?

A That would be the most accurate.

Q And anything else would not be entirely accurate?

A Not entirely. Closely but not entirely.

Q Well, how close?

A Within the industry among the union economists and among the company economists, the projections we use on overtime are accurate within 5 percent of this total earnings.

Q Is that 5 percent everyone or just 5 percent of the group you use to determine these figures?

A No, that would be applicable to everyone except the chief engineer who does not earn per se overtime.

Q Does the chief engineer earn more than a first assistant engineer?

A Yes, he does.

Q And that's an administrative position on the ship, is it not?

A Primarily it is.

Q It doesn't require any listing?

Q It may depending on the vessel.

Q But less than a first assistant engineer?

A Of course.

Q And if a man had difficulty in performing a job as a first assistant engineer, he can increase his earnings by obtaining promotion to a chief engineer?

A He would have to meet the prerequisites of having the credentials of becoming a chief engineer.

Q Which would be a chief engineer's license?

A That is correct.

MR. BARKAN: No further questions.

MR. THALER: No questions.

THE COURT: How does one become a chief engineer?

THE WITNESS: The Coast Guard is the administrative body for licensing --

THE COURT: After one has the license, then how do you get the job?

THE WITNESS: Once he becomes a chief engineer and has the license? The chief engineer can be -- is hired generally by the companies. The companies have exercised their prerogative to retain exclusive rights to hire their own chief engineers under the contract.

THE COURT: In other words, if a man has a license, whether or not he is going to get the job is

going to depend upon the employer?

THE WITNESS: That is correct.

THE COURT: What does a relief engineer mean in union parlance?

THE WITNESS: There are two categories of relief engineer. There is a night --

THE COURT: I am not talking about that. I think I know what they are. I guess I haven't made my question clear.

Assuming a man has the qualifications for being a first assistant engineer, what distinguishes between his being a first assistant engineer and being a relief engineer?

THE WITNESS: Well, there is no such thing as a relief engineer by law or on the ship's articles. It is the same as a first engineer. He is relieving the regular first engineer on that vessel so he may take his vacation or time off but he is employed as a first assistant engineer while he is relieving.

THE COURT: In other words, he is merely a person who is not permanently attached to the vessel?

THE WITNESS: Yes, sir.

THE COURT: And there is no reason why he couldn't be permanently attached to the vessel, all other things being equal, is that correct?

THE WITNESS: On the vessel he is relieving on, he cannot because of shipping requirements within the union but he can obtain employment eventually on that vessel as a permanent man.

THE COURT: Mr. Sheppard testified that he was for a while, I think the last ship he was on, he was employed on a permanent basis. Am I to understand that he could stay employed on a permanent basis as a first engineer provided he did not give that up voluntarily for whatever his reasons?

THE WITNESS: Yes, sir.

THE COURT: Let me be sure I understand these figures. These figures that you have given us are sort of general averages of people in the categories? You were getting the figures from the payroll, from personnel?

THE WITNESS: It is, sir.

THE COURT: Can you give us each of those years what the base pay was?

THE WITNESS: I can, sir.

THE COURT: Would you.

THE WITNESS: If I may, may I add them up so it will be easier to present them?

THE COURT: All right.

I have one more for arithmetic before you answer

it. That is for each of those years do you know what the hourly rate of overtime was?

THE WITNESS: Yes,I do.

THE COURT: And if you will give us those figures, then I think I will be very grateful to have put you to all this trouble. I appreciate that. Will you give us the hourly rate of overtime for each of those years in each of the categories?

THE WITNESS: I have them.

The first vessel would be an AA-3 vessel which would be the class representing the Lash Turkiye and the President Monroe.

THE COURT: That was the fourth example which you gave before?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: I will start with the year 1972 since the contract runs from mid year '72 to mid year '73.

THE COURT: All right.

THE WITNESS: 1972, first assistant's wages per month was $1,949.21.

1973 his wages were $2,066.18 per month.

If I may, I will give you the overtime rates for the same periods. 1972 the overtime rate per hour was

$13.15. And the hourly overtime rate in 1973 was $13.94.

His base monthly wage in 1974 was $2,231.49 and his hourly overtime rate was $15.09.

His base monthly rate in 1975 was $2,454.64. His hourly overtime rate would be $16.60.

In 1976, as of June 16th, his base monthly wage will be $2577.34. His hourly overtime rate will be $17.43.

In 1977 his base monthly rate will be $2,706.23 per month. His hourly overtime rate will be $18.37 per hour.

On Class A-1 automated vessel, which would be typified by the American Ranger --

THE COURT: I want to be sure I have it correct. Is that the same one as the SS New Yorker?

THE WITNESS: No, the New Yorker is a different class, sir.

THE COURT: Is that the Class A plus 10 percent?

THE WITNESS: The New Yorker?

THE COURT: No, the one you are about to give.

THE WITNESS: American Ranger is Class A plus 10 percent.

THE COURT: I have it marked down. I just wanted

to be sure. Go ahead.

THE WITNESS: In 1972 as first assistant his base monthly rate would be $1,704.16. His hourly overtime rate would be $11.52.

In 1973, the first assistant's base monthly rate is $1,806, 38. The hourly overtime rate is $12.21.

In 1974, first assistant's monthly rate would be $1,950.90. The hourly overtime rate, $13.19.

In 1975 the monthly rate for first assistant is $2,145.99. The hourly overtime rate is $14.51.

In 1976, as of June 16th, his monthly wage will be $2,253.30. The hourly overtime rate will be $15.24.

In 1977 his monthly rate will be $2,365.96. Hourly overtime rate, $16.

On the Green Wave, which is a Class A vessel, the first assistant's --

THE COURT: Which one is that? You gave us the class SS New Yorker. Which is it comparable to?

THE WITNESS: Green Wave was a CIass A vessel that I didn't have accurate overtime figures for so therefore I did not project total earnings.

THE COURT: Why don't we stick to what we have. Look at the SS New Yorker or that category. Those figures you gave us. I am interested in what the base

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wages are.

THE WITNESS: Well, then, under Class B vessels we have the Azalea City and the first assistant's monthly wage for 1972 was $1,427.77 per month. Hourly overtime rate, $9.66.

In 1973, first assistant's monthly rate was $1,513.45. Hourly overtime rate, $10.23.

THE COURT: What was the first figure again?

THE WITNESS: The 1972 figure, the monthly rate was $1,427.77.

THE COURT: All right. Then it is fifteen hundred-

THE WITNESS: -- thirteen forty-five.

In 1974 --

THE COURT: What was the overtime rate?

THE WITNESS: The overtime rate in 1972 was $9.66 and in 1973, $10.23.

In 1974, the first assistant's monthly rate was $1,634.53. His overtime rate was $11.05.

In 1975 the first assistant's monthly wage was $1,797.98. His overtime rate was $12.16 per hour.

In 1976, as of June 16th, his monthly rate as first assistant will be $1,887.87. The hourly overtime rate will be $12.77.

And in 1977, the first assistant's monthly

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rate will be $1,982.31. The hourly overtime rate will be $13.40.

On Class Diesel C as represented by the New Yorker, the day working first assistant in 1972 will be earning $1,558 per month and $10.62 per hour will be his overtime rate.

In 1973 the first assistant's monthly rate will be $1,651.48. His total overtime rate will be $10.85.

In 1974, his monthly rate was $1,783.60. His hourly overtime rate was $11.71.

His monthly rate in 1975 is $1,961.96. His hourly overtime rate is $12.89.

In 1976, as of June 16th, his monthly rate will be $2,060.06. His hourly overtime rate will be $13.53.

In 1977 his monthly rate for first assistant will be $2,163.06. His overtime rate will be $14.21 per hour.

THE COURT: Thank you very much.

Anything further?

Thank you.

(Witness excused.

* * *

HOWARD SHEPPARD
v.
PRUDENTIAL GRACE LINES, INC.

April 13, 1976,
10:20 A.M.

--

(In open court, jury present.)

THE COURT: The testimony of Mr. Schamann will be interrupted in order for the plaintiff to put on their medical expert. Then we will go back to Mr. Schamann.

All right.

L E O K O V E N, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. THALER:

Q Doctor, will you please state your medical background?

A I was graduated from New York University College of Medicine in 1943 and after serving in the Army I returned and had a residency training program, that is a program that is a full time in-hospital program for four years in the field of medicine known as orthopedic surgery. That is the specialty that deals with diseases, disabilities and injuries and deformities of the arms, the legs and the back. And I completed that in 1950 and took a qualifying

examination given by a national board of specialists and passed that successfully so that I became what is known as a diplomate of the American Board of Orthopedic Surgery.

Since 1950 I have practiced in Brooklyn, New York, and limited my practice to that specialty. I am now the Director of Orthopedic Surgery at the Jewish Hospital, Brooklyn, and at the Greenpoint Hospital where I -- at the Jewish Hospital where I direct a similar training program for other residents preparing them for the same specialty field.

I am also a member of the American Academy of Orthopedic Surgery and the American College of Surgeons and I am on the faculty of the State University of New York in the Department of Orthopedic Surgery.

Q Doctor, did you examine Howard Sheppard?

A Yes, I did.

Q Will you state the time and place of your first examination?

A Yes. I first examined Mr. Sheppard on October 7, 1974, at my office.

Q Did you make a record of your examination and the findings that you obtained?

A Yes.

Q Would it help you to look at that record to

refresh your recollection?

A Yes, it would.

Q What history did you receive at the time of your examination, Doctor?

A I received a history that he, Mr. Sheppard sustained an injury on April the 9th, 1973. At that time he was walking on the catwalk of a ship in the lower engine area. He was holding on to a handrail and there was some oily slick on the deck,on the flooring, and this caused him to slip and fall and both feet went out from under him. He tried to grasp a rail, a handrail, and he was twisted in such a fashion as to wrench his back and then he further fell and struck his right knee and low back. The accident occurred aboard a ship known as the SS Lash Turkiye, which was in drydock at that time in Brooklyn, New York.

Q What complaints, if any, did Mr. Sheppard make?

A At what time, sir?

Q At the time of your first examination.

A When I first examined him, which was, as I stated, on October 7, 1974, approximately a year and a half after the accident of April, 1973, he was complaining of a constant pain in the lower portion of his back which was persistent since the time of the accident. He also stated to me that he had numbness in his left lower extremity, in

his left leg that had begun shortly after the accident. In addition he said that he had a great deal of stiffness in his back going now to a year and a half after the accident. And that he couldn't run up a ladder, that is, a stairway of a ship rapidly and couldn't lift heavy objects because of the aggravation of his back complaints when he attempted to do so.

Q What observations did you make at the time of your first examination?

A There was a change in the posture of the lower portion of his back. Instead of having the normal hollow known as lordosis, there was a flattening of that lower back area. This is due to spasm of the muscles which is a protective device of the body and this spasm could be felt by the tenseness or tightness of the muscles that he couldn't simulate but that I could actually feel. Also the movement that he was capable of, both when he was asked directly to bend forward, backward, to the right and left, was restricted and this was confirmed by the fact that when he wasn't specifically asked to do that but was asked to do something else such as getting on and off a high table, it was also evident that he movedquite stiffly and with some restriction of back motion. He had tenderness in the lower portion of the back, that is, when I palpated with my

finger, the lower back at the junction of the lumbar spine, the lower portion of the back and the pelvis, so-called lumbosacral area, there was localized tenderness. And in addition he had some change in, loss actually of sensation throughout the left leg.

Another test that was positive was that when the left leg was raised off the table with the knee straight or in the extended position, as I am sort of demonstrating here with my arm, which is a test for back conditions, his test was positive and these were the positive findings with regard to my examination of that date.

Q Did you render a diagnosis?

A Yes, I did.

Q What is that?

A It is my opinion that he had a chronic sprain of an area in the low back known as the lumbosacral spine, the lowermost portion of the back, and that the ligaments of this area were chronically sprained, that is, over-stretched and unduly sensitive.

Q Doctor, I show you Plaintiff's Exhibit 3 which is the the hospital records from Norfolk, Virginia. Will you look at that, please.

Can you tell the court what those records state in regard to Mr. Sheppard's condition?

A Yes. Under the date of May 2nd -- I think they are a little bit out of order. Sorry.

Under the date of 4-10, April 10th, I believe, 1973, it states that Mr. Sheppard had a lumbosacral strain and that he was not fit for duty. On that date -- then the next date is, the next date recorded is April 12, 1973, and it refers to a visit to the clinic at Norfolk and it states that his chief complaint at that time was a sore back. The history is that he fell aboard a ship four days ago and as I see it, now back is sore and stiff. And it records the fact that they noted a restriction of back motion at that time and that their impression was lumbosacral strain, not fit for duty and they prescribed certain medications and heat and stated that, again, he was not fit for duty.

Then on the next recorded note here is May 2, 1973, it states that now feeling better. Apparently on that date he was marked fit for duty. Then the next recording is on August 16, 1973, and it states that his low back pain continues and he has a chronic, he used the word chronic lumbosacral strain.

Q What does that mean, Doctor?

A That it was unrelieved and ongoing and at least from the period of April through August of that year was developing into an ongoing chronic condition.

Q At my request did you review other medical records concerning Mr. Sheppard?

A Yes.

Q Do they relate to any of his back complaints?

A Again, trying to relate them to dates, this is an out-patient record of the United States Public Health Service in Baltimore. On November 12, 1974, it indicates recurrent back pain from injury sustained 18 months ago. I can't read it too well but it states he has persistent numbness in the left leg and that he had had a consultation in Arkansas and had been told that he needed an operation. At that time -- I am sorry, I cannot read this too well but-- they were trying to distinguish between a spine lesion and a nerve compression, a compression of the nerve. The remainder of this record refers to -- does not refer to his back.

THE COURT: What point are you trying to get from the doctor?

MR. THALER: I would like the doctor to read the medical record concerning Mr. Sheppard.

THE COURT: For what purpose?

MR.THALER: I can't read it.

THE COURT: Have you consulted those hospital records, Doctor, in connection with your own examination?

THE WITNESS: I consulted the first ones I testified to but these two subsequent ones I am seeing for the first time and as I stated a moment ago I believe they indicated that a year and a half later he had gone to the clinic in Baltimore because of his ongoing back condition.

THE COURT: All right, Mr. Thaler, let's proceed.

Q Did you see Mr. Sheppard after the first visit, Doctor?

A Yes, I did.

Q Will you describe the course of his recovery and extent of pain and disability that you observed during that period?

A Yes. He told me five days ago that there had been some improvement for a while and then the complaints had come back and that as of the present time and for quite some time, specifically at least since the past November and perhaps before that,but that he recalls since November, the pains have been absolutely constant in his low back and they are of moderate intensity. That the left leg, entire left leg still feels numb except for the bottom of his foot and that his back still feels stiff. In other words, basically the same story that he related to me when I first examined him and he further informed me that he had asked

for a transfer of his current position on board ship because of his inability to lift, bend and lift and pick up heavy objects, which was part of his job.

Q What treatment could be given to Mr. Sheppard, if any, in regard to his back?

A Well, the best treatment would be prophylactic, that is, to avoid that which produces additional strain such as bending, lifting and climbing, pushing, shoving. In other words, anything that puts an undue stress on the low back area would be in effect treatment in that it would avoid the further strain, stress on the sprained ligaments.

Q Doctor, I would like you to assume these facts as true.

On or about April 9, 1973, Mr. Sheppard was a first assistant engineer on the SS Lash Turkiye. At about 11 A.M. Mr. Sheppard slipped and fell to the deck on the catwalk in the lower engine room in the vessel. He slipped with both feet and as he was holding on to to handrail with his hand he twisted as he fell, hit his right knee and fell backwards.

Doctor, based upon your examinations and the aforementioned, do you have an opinion with reasonable medical certainty as to whether Mr. Sheppard's injury is a

competent producing cause of whether -- whether his accident was a competent producing cause of his injuries?

A The accident as described is within a reasonable degree of medical certainty a competent producing cause of the type of injury I have related Mr. Sheppard has.

Q Further assume that as a first assistant engineer Mr. Sheppard is required from time to time to lift heavy objects. Do you have an opinion with reasonable medical certainty as to whether or not Mr. Sheppard is disabled from performing such work which requires heavy lifting?

A It is my opinion that he is disabled from such work.

Q Doctor, do you have an opinion within reasonable medical certainty as to the permanency of Mr. Sheppard's condition?

A In view of the time that has elapsed and the age of this patient, it is my opinion that this is a permanent condition.

Q Do you consider Mr. Sheppard significantly fat?

A No.

THE COURT: You mean the doctor has an expert opinion on that?

MR. THALER: Well, I think defendant's doctor has.

I have no further questions.

CROSS EXAMINATION

BY MR. BARKAN:

Q Dr. Koven, you were examining a Baltimore Marine Hospital record, am I correct?

A Yes.

Q And I believe you mentioned that there were other things he was being treated for on those dates that you read that dissertation about his back?

A The date I referred to was November 12, 1974, and I stated that the record had other things in it but on that date, which is the only one I referred to, the record only refers to his back as far as I can read it on that date.

Q Was he marked fit for duty or not fit for duty on that date or was there no determination?

A There was, as I see it, no determination on that date.

Q So in other words, he would be capable of working after reporting to the Baltimore Marine Hospital?

MR.THALER: I will object to the form of that. Capable of working at what?

THE COURT: Objection overruled.

MR. THALER: We don't --

THE COURT: The objection is overruled.

A I have no way of determining from that at this date. There is no determination made here.

Q And you cannot determine from the record if he was treated for other things on that date either?

A Yes, he was. I'm sorry. Maybe I didn't understand I can't hear you too well, sir.

Q I'm sorry. He was treated for other things on that day?

A Yes. He was treated for one other thing. I thought you were referring to his complaint. I think that was your question. If I'm wrong I'm sorry but the treatment, yes. Well, he requested -- he requested a diet pill but the request says it was denied.

Q You rendered an opinion as to Mr. Sheppard's fitness to work. Is he capable of working as a marine engineer?

A He is capable of working as a marine engineer under the limitations I have stated as to what it might do to his health.

Q Well, did you prepare a written report with regard to your examination on October 7, 1974?

A Yes.

Q Did you know at the time that you prepared that

report that Mr. Sheppard had in fact been employed prior to that date as a first assistant engineer?

A My understanding was that he was trying to be promoted to a first assistant engineer.

Q Did you believe at that time that he was capable of working as a first assistant engineer?

A I did not think that he should be working as a first assistant engineer.

Q And at that time you did not know that he had been working as one?

A It was my understanding that he was trying to become one. That is all I knew.

Q Well, the fact that he had been working as a first assistant engineer, would this change your opinion?

A It only changes my opinion as to the fact that--

Q Well, yes or no, Doctor.

A I'm sorry. No, it does not change my opinion.

THE COURT: Doctor, I don't understand what the opinion is. I think both of you are --

THE WITNESS: Neither do I, your Honor.

THE COURT: Both of you are too vague to be very helpful. Do you really mean he can't work as a first assistant engineer or that there are certain aspects of the job that he can't perform? You don't mean he can't

work as a first assistant engineer, do you?

THE WITNESS: I think I was restricted to yes or no but in the frame of reference that you are placing it, that is my answer, that there are certain aspects of the job that he cannot or should not perform, although he may be working as such.

THE COURT: And as I understand you, you would have not recommended that he work in any job that requires any lifting of any heavy objects and I gather bending and things of that kind, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Aside from that, he can perform in any job, can't he?

THE WITNESS: Yes.

THE COURT: All right.

MR. BARKAN: I have no further questions then, your Honor.

MR. THALER: No questions.

THE COURT: Anything else?

MR. THALER: I have Mr. Schamann.

THE COURT: By the way, when did you examine Mr. Sheppard?

THE WITNESS: Two times, the first time was in November, 1974, and the second time was five days ago,

THE COURT: All right, thank you.

(Witness excused)

* * *

AFTERNOON SESSION

2 P.M.

(In open court, jury present.)

THE COURT: All right.

MR. BARKAN: I call Dr. Balensweig.

H O W A R D B A L E N S W E I G, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BARKAN:

Q Dr. Balensweig, would you please state your medical education and background?

A Yes, sir. Graduated from Cornell University Medical School in 1946. Had a year and a quarter internship at Hospital for Joint Diseases. Spent two years in the Army, most of the time as chief radiologist at Camp Kilmer Station Hospital in New Jersey. Then I took a three-year orthopedic residency at Hospital for Joint Diseases, finishing in September of 1952. Had a traveling fellowship in Europe for six months in orthopedics and then started practice in New York City May, 1953, and I have been practicing orthopedics ever since then up to recently in partnership with my father who was an orthopedist as well since about 1920. And I received my Boards in orthopedic surgery around 1955. I have

been instructor in fractures at Cornell Medical School since 1953. I am now inactive at that. I am presently assistant attending surgeon at New York Hospital for Special Surgery, which is an orthopedic hospital.

Q Dr. Balensweig, did you at any time examine Mr. Howard Sheppard?

A Yes, I did.

Q On what date?

A October 7, 1974.

Q Do you have a record of that examination?

A I do.

Q Would you like to refer to the record?

A Yes.

Q What complaints did he make when you saw him?

A When I saw him he told me that he had a constant feeling of numbness in his left upper thigh down to the lower calf but not into the foot. That the right leg felt more normal. That he had a constant pain his low back and he pointed to the lumbosacral region, which is the area between your pelvis and your lower spine, and that warm soaks didn't make any difference. That he can tolerate the pain and he finds he can't lift anything very heavy. He can walk all right. He can't run. The back pain doesn't wake him at night and it stayed about the same for the past year.

Q What did you do when you examined him?

A I had him undress completely. He was not wearing any brace. He was five eight and a half and he weighed 200 pounds, which I estimated was significantly overweight. His neck and his upper extremities were normal. His posture is basically normal. The right pelvis was a little bit higher than the left but minimally so. He was able to walk normally. I asked him to walk on his toes and his heels. He did that normally. When walking on heels he indicated he felt some pain in the low back. I then examined his spine, asked him to lean backwards or extend his back and he did that through a range of 5 degrees and his muscles appeared somewhat tight. His normal range is between 10 and 15 degrees. He complained of soreness, again, at the lumbosacral angle. I asked him to bend sideways to either side, which he did, through a normal range of 30 degrees without any complaint. I then asked him to bend over and touch the floor with his knees straight. He did this a bit slowly. He did show some rounding of his back. In other words, the lumbar curve did reverse.

He finally reached until his fingertips were 10 inches above the floor. The range of motion is 65 degrees. At that point, when he got all the way down, he told me he again started to feel pain in the low back. I noticed some

fullness in his left lumbar muscles that looked to me like a lipoma, a benign fatty tumor, fat overlying the muscles. Range of 65 degrees until fingertips 10 inches above the floor is within the normal range. I don't know what he has done in the past so I can't say what is normal for him. A little better than what I can do.

Q What was your impression as a result of this examination?

A My impression was that he still -- I did more examination.

Q I'm sorry.

A After examining him standing I had him lie on his back. His straight leg raising was normal without pain -- I'm sorry. His act of straight leg raising was normal, 70 degrees, and he felt a little pain in the lower back. Passive straight leg raising or my raising his leg up by the heel was again normal 75 degrees. He had no complaints when I did it. He felt a little pain in the back when he did it. His hips and his knees were normal. His legs measured almost equal. The right leg was a quarter of an inch longer than the left. The right thigh and right calf were a half inch smaller than the left.

On the neurological examination, he complained of diminished sensation of pin prick from his upper thigh down

to his ankle on the left side, with sensation of vibration being intact and his reflexes normal. I had him turn face down and when I pushed hard he complained of tenderness in the middle of the spine at L3-4 and at L4-5. He did not complain of tenderness at the lumbosacral angle even though that's where he referred his pain when he moved.

I took X-rays of him. His X-rays were normal except that he has, instead of 5 lumbar vertebrae, he has 6. About 5 percent of people have either 4 or 5 so it's a little odd but it is not really that unusual. His X-rays were absolutely normal otherwise. He had a congenitally narrow disk space between the 6th lumbar vertebra and the sacrum and this we find essentially all the time.

He had a very early calcification of his main artery called the aorta. In other words, he had early signs of hardening of the arteries. He has a history of diabetes and that's consistent with that. You get premature hardening of the arteries with diabetes.

My impression after examination was that he initially had had a lumbosacral strain or sprain and that he was left with some mild residuals. From my examination that he was able to do his regular work and the main treatment would be to lose some weight.

Q Did you anticipate any permanency?

A No, I did not.

Q Was he capable of working?

A Yes.

Q Was he capable of working as a marine engineer aboard a vessel?

A Yes, he was capable of doing that and he had been doing that when I saw him.

MR. BARKAN: Thank you, Doctor.

MR. THALER: I have no questions.

THE COURT: Thank you, Doctor.

(Witness excused)

THE COURT: Anything further?

MR. BARKAN: No.

THE COURT: Do you rest?

MR. BARKAN: Yes, your Honor.

THE COURT: Anything further?

MR. THALER: Nothing.

THE COURT: Ladies and gentlemen, I will have to excuse you for a few minutes. I have to go over the requests to charge with counsel. We will do that and then we will come back as soon as that's over for you to hear the final argument.

(The jury left the courtroom.)

THE COURT: You gentlemen can come in the robing

* * *

Sheppard v. Prudential

CHARGE OF THE COURT

(Carter, J.)

THE COURT: Ladies and gentlemen, we now come to that part of the case where the evidence is in, the lawyers have presented their arguments, and you are about to exercise your ultimate role as jurors. That role has three parts: First, you are to pass upon and to decide the fact issues that are in the case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence, you determine the credibility of witnesses. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony, the exhibits or stipulations of counsel in the case.

Next you are to apply the facts as you find them to the law which I shall give you in this charge, and finally you are to render a fair and impartial verdict. You are to perform this duty without bias or prejudice to any party, deciding this case solely on the evidence as introduced in this trial. Our system of law does not permit jurors to be governed by sympathy or prejudice. At times throughout the trial I have been called upon to make rulings upon various matters of law, as for example, when a question was put to a witness and was objected to, or after a question was

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answered and a motion was made to strike the answer. I have sustained some objections and I have overruled others.

As I explained to you before, it is essential in the performance of your duty that when anything was ordered stricken from the record, that you put it out of your mind and disregard it entirely. Again, let me say, please do not concern yourself at all with my reasons for any of these rulings. They are purely legal matters and are of no concern to you.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the plaintiff or the defendant may have said with respect to matters in evidence during the trial in a question, in colloquy with the court, in argument or in summation is not to be substituted for your own recollection of the evidence. So too, anything the court may have said during the trial or may refer to during the course of these instructions as to any factual matter in evidence is not to be taken in lieu of your own recollection. The case must be decided by you upon the sworn testimony of the witnesses on both direct and cross-examination, including depositions read to you in this courtroom, such exhibits as were received in evidence and any stipulations entered into among counsel.

While you are duty bound to consider the evidence

in this case as just defined, in your consideration of the evidence it is the sum of all the evidence on which your determination must rest and in that determination you are not limited to the bald statements of witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified in the light of your own experience.

It is your function to determine the truth or falsity of the testimony of each witness who has testified. No inference as to the credibility of any witness should be drawn from the fact that upon occasion I have asked questions of a witness. My questions were only intended for clarification or to expedite matters. They were not intended to suggest any opinion as to the credibility of any witness who appeared before you.

Let me repeat what I indicated to you before and that is this process of how do you determine the truth and how do you appraise the credibility of witnesses, and I will repeat what I said before. You use your plain everyday common sense. The degree of credit to be given to a witness should be determined by his demeanor, his relationship to the controversy and to the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all the

other testimony and attendant circumstances in the case. You observed the witnesses. You heard their testimony. How did they strike you? Did their answers seem frank, open, truthful and candid, or were they equivocal, deliberately confusing or evasive or were they somewhere in between? How did each witness impress you? So you take each one, and on the basis of your common sense and your everyday experience you determine whether or not you believe the witness and the extent to which you believe him.

The credibility of that witness whose testimony was read to you, cannot, of course, be judged by personal observation, but at the same time you must assess his credibility.

The testimony of a witness may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood, or because the witness did not accurately observe the events about which he testified, or because his recolllection of what happened is at fault, or even because he has not expressed himself clearly in giving testimony.

You may accept so much of the testimony of a witness as you deem true, and disregard the rest. If you find that any witness has wilfully testified falsely to any material fact, you may disregard all of his testimony or accept such part of

it as you believe worthy of belief as it appeals to your reason or judgment. You are at liberty, if you deem it appropriate, to disbelieve testimony in whole or in part, even though it has not otherwise been contradicted or impeached.

An interested witness is not necessarily unworthy of belief but the interests of a witness in the outcome of a lawsuit is a factor which you may consider in determining the weight and credibility to give to that witness' testimony.

Certain of the witnesses who have been called in this case have been identified to you as expert witnesses. These have been Dr. Koven and Dr. Balensweig, who were the medical men, and Mr. Zornes and Mr. Schamann, and these men have been qualified to give expert opinions in the area of their expertise.

The law permits an expert witness to testify in the form of an opinion, and the opinions stated by these experts are based upon particular facts as the expert himself has observed them or as the attorney who questioned him has asked him to assume.

However, the expert is subject to the same rules of credibility as any other witness. You may reject the opinion of an expert if you find the facts different from what he assumed or if you find his testimony unconvincing, and you may accept or reject the testimony as you would the

testimony of any other witness. The opinions of the experts must be considered by you, but they are not controlling in reaching your judgment. In short, you may give the expert testimony such weight as you feel it deserves. The determination in this case rests with you and not with the experts.

In deciding this case you will be called upon to consider both direct and circumstantial evidence. I would like to explain the differences between these two types of evidence.

Direct evidence is where a witness or participant testified as to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses. A document can also contain direct evidence.

Circumstantial evidence is proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

There are times when different inferences may be drawn from facts, whether they are proved by direct or

circumstantial evidence. The plaintiff asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide, and you alone, which inferences you will draw.

This action is brought by the plaintiff and the burden of proof is on the plaintiff to prove each and every essential element of his claim against the defendant by a fair preponderance of the evidence.

A fair preponderance of the evidence means the greater weight of the evidence. It does not necessarily have to be determined by the greater number of witnesses testifying to a fact or state of facts. It merely means that the evidence in favor of the party on whom the burden rests must have more convincing weight than the evidence which is opposed to it. Let me give you an illustration which might, at least I hope it will make the meaning clearer.

Let us assume that we have before us a scale and we will call that the scale of justice. As you evaluate all the evidence, the credible and believable evidence, you place all that is credible and believable in favor of the plaintiff on one side of the scale and on the other side of the scale you place the credible and believable evidence in favor of the defendant. In doing this you take into account, as I told you earlier, the testimony of all the

witnesses, both direct and cross-examination, including the depositions, the various exhibits that were received in evidence, and the stipulations on evidentiary matters entered into by counsel.

If, after considering all the evidence, you are satisfied that the plaintiff's evidence in terms of quality and credibility on each essential point as to which he has the burden of proof outweighs that of the defendant, then the plaintiff has met his burden of proof. If, after consideration of the total evidence, however, you find the evidence of both parties is equally weighted or that the scales are in balance, then the plaintiff has failed to sustain his burden of proof.

If you find that the believable and credible evidence is weighted in favor of the defendant, then obviously the plaintiff has failed to sustain his burden of proof.

This case involves a claim by the plaintiff, Howard Sheppard, against the defendant, the Prudential Grace Lines, Inc., for personal injuries allegedly sustained by the plaintiff while he was employed as first assistant engineer on board the SS Lash Turkiye, which vessel was owned, equipped, operated, manned and controlled by the defendant.

Plaintiff claims he was injured due to the

unseaworthy conditions on board the ship.

Alternatively, he claims he sustained his injury due to the negligence of the ship owner.

With respect to these claims against the defendant, bear in mind that a corporation can act only through its agents, officers, directors and employees.

Notice or knowledge of any fact on the part of any agent, employee, officer or director of a corporation may be considered by the jury as knowledge of and notice to the corporation, if such notice or knowledge was received by the officer, director, employee or agent in the course of his employment and within the scope of his duties. Furthermore, if you find that an officer, agent, director, employee of the corporation was negligent while he was engaged in the course of the corporation's business and while he was attempting to further the interests of the corporation, then the corporation is responsible for that negligence and would itself be negligent.

I want to point out that the mere happening of an accident carries with it no presumption of negligence or unseaworthiness of a ship. The party alleging the negligence or breach of duty to provide a seaworthy ship must prove by a preponderance of all the evidence that he has a right to be compensated by the defendant because the defendant was

negligent or because the defendant breached the duty to provide a seaworthy ship and such negligence or breach of duty played any part in causing his injury.

I will instruct you separately as to the law of unseaworthiness and the law of negligence.

First as to unseaworthiness. Under the maritime law, every ship owner or operator owes to every member of the crew the nondelegable duty to keep and maintain the ship in a seaworthy condition at all times. To be in a seaworthy condition means to be in a condition reasonably fit to be used for its intended purpose. A seaworthy condition requires everything aboard the ship, the equipment, machinery, hatch covers, working areas and so forth, must be reasonably adequate and safe for their intended use.

Liability for any unseaworthy condition does not in any way depend upon fault or blame. The ship owner is liable for an unseaworthy condition existing at any time; even though the owner may have exercised due care under the circumstances and may have had no knowledge of the unseaworthy condition. It does not matter how long or short a time the condition of unfitness may have existed prior to the accident.

The ship owner is required to provide working areas which are reasonably fit; perfect equipment or an

accident-free ship, of course, is not required nor is the latest or most modern equipment required, as long as the equipment used is reasonably fit for its intended purpose. The plaintiff is not required to prove that the entire ship was unseaworthy, that is, that the ship would sink if she attempted to float. All that he must prove is that the equipment or working areas involved in this case were not reasonably fit for their intended purposes and that he was injured as a result.

The issues to be determined by you as between the plaintiff and the ship owner on the claim of unseaworthiness are these: Has the plaintiff shown by a fair preponderance of the evidence that the ship's equipment or working areas were unseaworthy? If your unanimous answer to that question is no, you should return a verdict for the defendant ship owner on the claim of unseaworthiness. But if your unanimous answer is yes, then you have a second issue to determine: Did the unseaworthiness of the vessel play any part at all in causing the plaintiff's injuries.

An injury is caused by the unseaworthiness of a vessel when it appears from the evidence in the case that the allegedly defective equipment or unsafe working areas played some part, no matter how small, in bringing about or actually causing the injury in whole or in part.

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This does not mean that the law recognizes only one cause of an injury or damages, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damages; and in such a case each may be a cause.

If you find that the vessel was unseaworthy and if you find that the unseaworthiness was a cause of the injury, then you must award damages to the plaintiff in accordance with the rules I will give you later, and you need not consider the plaintiff's negligence.

I will now instruct you with respect to the second claim, that of negligence. The plaintiff contends that even if you should find that the vessel was seaworthy, nonetheless he is entitled to recover upon the second claim, namely that the ship owner was negligent.

The ship owner, entirely apart from its duty to supply a seaworthy vessel, also owes to each member of the crew a duty to exercise reasonable care to provide a reasonably safe place in which to work.

Negligence is the failure to use ordinary care under all the circumstances. It is doing that which a reasonably prudent person would not have done, or the failure to do

what a reasonably prudent person would do under all the circumstances of a given situation.

The defendant cannot be held liable unless the plaintiff proves by a fair preponderance of the evidence that the defendant breached this duty of ordinary care by some negligent act of the corporation or one of its agents, officers or employees and that the negligence of the defendant played some part in causing the plaintiff's injuries.

You will remember that under the unseaworthiness claim it did not matter if the ship owner exercised reasonable care or if the ship owner knew or did not know of the alleged unseaworthy condition. The rule with respect to the negligence claim is different. The ship owner cannot be held liable unless he knew or in the exercise of reasonable care should have known of a claimed unsafe condition, and the plaintiff must prove the defendant's negligence by a fair preponderance of the evidence.

This does not mean, of course, that the ship owner was a guarantor or insurer of the plaintiff's safety. The extent of the ship owner's duty with respect to the plaintiff's claim of negligence was nothing more than to exercise ordinary care under the then existing circumstances. This continuing duty to use ordinary care under the circumstances is

owed by the ship owner to the crew members while aboard the ship.

If the ship or the ship's equipment or working areas were in a dangerous condition and the dangerous condition was not readily apparent to a person exercising ordinary care and caution under the circumstances, and if the ship owner had actual knowledge of the dangerous condition, or if the dangerous condition was such as would have been known to the ship owner in the exercise of ordinary care under the circumstances, then the law imposes upon the ship owner the duty to give the crew members reasonable warning of such danger but the ship owner is not charged with knowledge of defects which reasonable inspections would not have disclosed, and the ship owner is entitled to assume that crew members would see and observe that which would be obvious through the use of an ordinary person's senses or would reasonably be expected under the circumstances.

So there is no duty on the part of the ship owner to give a crew member notice of an obvious danger, or of a danger that would have been apparent to a reasonably prudent person exercising ordinary care under the circumstances as shown by the evidence in the case.

However, in the absence of circumstances that would caution a reasonably prudent person to exercise ordinary care

under like circumstances, the plaintiff has the right to assume or to act upon the assumption that his place of work aboard the ship and the equipment furnished to him by the ship owner with which to carry on his work as a crew member are reasonably safe under the existing circumstances.

If you find that the plaintiff Sheppard did not have a reasonably safe place in which to work and that the ship's officers knew, or in the exercise of reasonable care should have known, of the unsafe condition and failed to take reasonable steps to correct it, then you have sufficient grounds to find the defendant ship owner negligent.

You will recall I told you with regard to unseaworthiness that even if you found that the ship was unseaworthy, the plaintiff could recover damages only if his injury was caused by the ship's condition. The same principle holds true for negligence. Even if you find that the ship owner was negligent, the plaintiff is entitled to recover damages only if you find that the defendant's negligence played some part in causing the plaintiff's injury.

The ship owner claims as a defense to the plaintiff that the plaintiff himself was negligent. The plaintiff has a duty to take reasonable care for his own safety. I have already instructed you as to the law of negligence and you must apply this same law to determine if the plaintiff

was negligent.

Briefly, you must determine if the plaintiff used ordinary care under the circumstances for his own safety. Any lack of care on the plaintiff's part will reduce his recovery in proportion to the extent to which the plaintiff's own negligence contributed to the accident. Thus, if you determine that the plaintiff's negligence was the sole, the only cause of his injuries, then the plaintiff cannot recover anything from the ship owner, either for negligence or unseaworthiness. That is to say, the plaintiff's recovery would be reduced by 100 percent.

If you find, however, that the plaintiff's negligence contributed only in part to his injuries, then the plaintiff may recover from the ship owner, but subject to a reduction in damages to the extent that the plaintiff's negligence contributed to his injury.

The burden of proof as to contributory negligence is on the defendant to establish that the plaintiff himself was at fault. Although a seaman never assumes the risk of injury from any negligence of another, or from any unseaworthiness of the vessel, it is a fact of common knowledge that in almost every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of either negligence or unseaworthiness. A seaman, when he

enters upon his calling, must assume all the inherent and unavoidable risks of his occupation, as all persons must, and no person may recover for injuries resulting from such inherent and unavoidable risks.

We have now reached the question of damages and you will only have to decide damages if you find that the plaintiff has shown that the vessel was unseaworthy or that the ship owner was negligent and that such negligence or unseaworthiness played some part in causing his injuries. If the plaintiff has failed on both grounds, you don't have to consider damages at all.

My charge to you on the law of damages does not mean, therefore, that you should assume that I feel that the plaintiff is entitled to damages. Deciding this case is your function, not mine. In assessing damages your aim should not be to make the plaintiff rich at the expense of the defendant. Your aim should be to award the plaintiff a sum of money which will be fair and reasonable compensation to him for the injuries he received as a result of the unseaworthiness or negligence. You are to be guided by your common sense and experience.

The plaintiff has the burden of proof on all items of damages. That is, the evidence which he offers in support of a particular item for which he seeks recovery must

persuasive than the evidence opposed to it. It is for you to determine whether, and the extent to which the plaintiff has met this burden.

If you find that the plaintiff is entitled to a verdict, in fixing the amount of the award you may not include in or add to an otherwise just award any sum for the purpose of punishing the defendant or to serve as an example or warning to others. Nor may you include in the award any sum for court costs or attorney's fees.

In arriving at the total amount of the award for the plaintiff, if any, you may take into account the following elements which plaintiff must establish by a fair preponderance of the evidence.

First, a sum which will compensate the plaintiff reasonably and adequately for any medical and medically-related expenses which you find he has incurred as a result of his injury and will incur in the future as the cost of the treatment of his injuries. You should include in this amount all reasonable expenditures for medicine, physician' charges, X-rays and so forth which have actually been incurred in connection with the plaintiff's injury and such reasonable and necessary medical and medically-related expenses as are reasonably certain to be required in the future as a result of the injury in question. In making this determination, you

should take into account plaintiff's life expectancy, as I will define it for you shortly. As I recall the evidence, there was no evidence of any medical or medically-related expenses which have been incurred up to now.

Secondly, a sum which will reasonably and adequately compensate the plaintiff for any pain and suffering, mental anguish suffered by him, which has resulted from the injury involved here. In determining the extent of such pain and suffering, if any, you may take into account such factors as the seriousness of the injury, the length of time the plaintiff was hospitalized, the extent to which the plaintiff has recovered, and the extent to which the injury has affected the plaintiff's social and recreational activities.

In addition you should award to the plaintiff a sum which will compensate him for such pain and suffering and mental anguish, as I have defined these to you, which you find from the evidence that the plaintiff is reasonably certain to suffer in the future. In making these determinations, there is no yardstick or mathematical formula to guide you. Use your good judgment and common sense taking into account the nature and extent of the injuries and those you find to be permanent. Here again, you should take into account the estimated life expectancy of the plaintiff.

Third, the plaintiff may be compensated for

past and future loss of earnings which are the natural consequence of his injury. Once again the plaintiff must show by a preponderance of the evidence what his actual loss of earnings were. You must compute from the evidence how much the plaintiff could have earned without the injuries and subtract from that sum the amount he actually did earn in spite of his injuries. The result is the reduction or diminution of his earnings attributable to the accident. In the same way you must estimate Mr. Sheppard's future loss of earnings. The plaintiff must convince you by a preponderance of the evidence that his future earning capacity is reduced as a result of his injuries. In determining this amount you should consider what the plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration. Any of these factors may help you to determine, first, the effect of any of the injuries upon the plaintiff's future earning capacity, and second, the value of any loss of future earning power. In making these estimates, use the work expectancy of the plaintiff as I will define it for you.

Any award you make for loss of earnings to date may not be estimated but must be calculated from the evidence

of actual loss of earnings that has been presented to you.

The award for future losses, on the other hand, obviously turns on matters that cannot be determined with certainty or precision. How long is it likely the plaintiff will live? What is his life expectancy? How long is it likely that plaintiff would have continued to work or will continue to work, his work expectancy as distinguished from his life expectancy.

Your determination of the plaintiff's life expectancy plays an important part in evaluating the award for future medical expenses, future pain and suffering and prospective loss of wages. In addition, the plaintiff's work expectancy is needed to compute his loss of future earnings.

Plaintiff has submitted mortality tables that show that the probable length of life of a person of the age of the plaintiff, the chart shows that Mr. Sheppard is now 53 years old and he has a life expectancy of 20.7 years.

Remember that these mortality tables are based upon studies which estimate the probable average length of life of all persons of a specified group or of a given age. The charts apply to one who has average health and exposure to the danger of people of that age. It is simply an estimate based upon past experience. You are free to consider the mortality tables, but they are not binding upon you.

We know that some individuals within the specified age group will live longer and others will die before the statistical life expectancy. You may also consider in deciding the life expectancy of the plaintiff everything you may have seen or heard here concerning the condition of his health, his habits, his work, his activities and any other relevant factors. Similarly, work expectancy refers to the probable number of years that an individual of a specified age and group will work.

To determine the work expectancy, you must estimate, based upon life expectancy, health, occupation, habits, and so on how long the plaintiff could reasonably be expected to work were it not for his injuries.

You ought not to award damages for any injury or condition which the plaintiff may have suffered, may now be suffering, or may suffer in the future, unless he has established by a fair preponderance of the evidence in the case that such injury or condition was caused in whole or in part by the accident in question.

Finally, let me remind you that the damage award which you return should be a lump sum figure which reflects the aggregate of the various elements of damages which I have described to you, and which are sustained by the plaintiff as a result of the accident.

In determining the total amount of compensation to be paid to the plaintiff, you are entitled to take into account the fact that a lump sum received today is worth more than the same total paid in instalments over a period of years.

Accordingly, your total award may reflect a discount based upon the increased value to the plaintiff of receiving a lump sum figure.

After you have computed all the elements of damages and arrived at a lump sum figure, you still have one more task. As I told you earlier, the plaintiff is always required to exercise reasonable care for his own safety. If you find that the injury to the plaintiff was contributed to in part by his own fault, then to that extent you should reduce the amount of damages which the plaintiff is entitled to recover. Thus, if,for example, you find that the accident was 40 percent of the plaintiff's fault you should reduce the amount of damages he recovers by 40 percent. Remember that on the issue of whether or not the plaintiff was negligent, the defendant has the burden.

Once again, I would like to remind you that my discussion of these items of damages does not mean that I believe the plaintiff is entitled to receive any damages

from the defendant. That is for you to decide.

Your sworn duty here is to decide the issues in this case fairly and impartially upon the evidence presented and on these instructions that I have given to you. Each juror is entitled to his opinion, and you are required to exchange views with your fellow jurors. That is the very purpose of jury deliberations. It is your duty to discuss the evidence. If you have a point of view and if, after discussion with others, it appears that your decision is open to question, then you should, of course, have no hesitancy in yielding your point of view, that is, only if the opposite point of view is really one that satisfies your own judgment and conscience.

However, you are not to give up a point of view that you conscientiously believe in simply because you are outnumbered and outweighed. Your verdict must be one with which each of you agree.

If during your deliberations you deem it necessary to have any of the exhibits, they will be sent in to you on request. If you wish any portion of the testimony read or the charge be reread, that, of course, will be done. Let me suggest on that that the purpose of jury deliberation, of course, is to exhaust your collective recollection. It's been a short trial and I would suggest that you exhaust your

collective recollection before seeking to have any of the testimony reread to you and so forth. If you need it, obviously it will be given to you.

I am going to give to the forelady for your deliberation the following series of questions, which are seven, which I think will help you in the case.

The first question is: Do you find that plaintiff has established his claim that the ship was in an unseaworthy condition and this unseaworthiness played any part at all in causing plaintiff's injury. And you answer that yes or no.

Number 2: Do you find that the plaintiff has established his claim that the defendant was negligent and that defendant's negligence played any part at all in causing plaintiff's injury. Yes or no. If the answer to both questions 1 and 2 is no, your verdict is for the defendant and you should put an X here and you need not answer any further questions.

If your answer to either question 1 or 2 is yes, what is the total amount of damages to the plaintiff. Answer that in dollars and cents.

Number 5. In the event you have found that the plaintiff is entitled to recover, do you find that the defendant has established its claim that the plaintiff was

himself negligent and that the plaintiff's negligence was a cause of the injury. Yes or no.

If your answer to question 5 is yes, what percentage did plaintiff's fault so contribute. If your answer to question 5 is no, obviously you don't have to answer the question. If you have entered a percentage on this question, fill in its equivalent dollar amount here. Multiply the above percentage by the total recovery from question 4.

In 7, subtract the dollar amount in question 6 from the total amount of damages stated in question 4 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover.

I think that will help. Our procedure is for me to go in the robing room with counsel and go over my charge to see whether I have misstated anything and then we will come out and I will turn the case over to you and you can deliberate.

(In the robing room.)

THE COURT: Okay, Mr. Thaler, what are your exceptions?

MR. THALER: Your Honor, I have one other than the ones that I noted previously.

THE COURT: Let's not go over those.

MR. THALER: Related to the unavoidable risks and

inherent dangers.

THE COURT: Okay. It is on the record. What else?

MR. THALER: That's all.

MR. BARKAN: I have none, your Honor, other than the ones I stated before.

THE COURT: You stated them.

(In open court, jury present.)

THE COURT: All right, Mr. Clarkson, Mrs. Pellum, thank you very much. You are excused. I gather you will still be on jury duty for a while but you are excused from this case. Thank you.

THE CLERK: Will the marshal come forward, please.

(One marshal was duly sworn.)

THE COURT: Would you see that the other two are out of the jury room. As soon as the room is cleared, you can retire to deliberate.

(At 4:15 P.M. the jury retired to commence their deliberations.)

lzh 277

THE COURT: If they want any exhibits you gentlemen can agree on them without the necessary of my coming back downstairs. For your plans, this is a civil case. I am going to have them stay here until -- probably if they haven't reached an agreement by 6 o'clock I will let them go and resume tomorrow morning. We won't stay much beyond 6 o'clock

(Recess)

(At 5:20 P.M. the jury returned to the courtroom.)

THE CLERK: Madam forelady, has the jury agreed on a verdict?

THE FORELADY: Yes, we did.

THE CLERK: Would you read your verdict, please. Read the questions and then the answers.

THE FORELADY: Do you find that plaintiff has established his claim that the ship was in an unseaworthy condition and this unseaworthiness played any part at all in causing plaintiff's injury?

No. The answer to that was no.

2: Do you find that plaintiff has established his claim that the defendant was negligent and that defendant's negligence played any part at all in causing plaintiff's injury?

Yes.

4: If the answer to either question 1 or 2 above

is yes, what is the total amount of damages to plaintiff? Answer in dollars and cents.

$120,000.

5: In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that plaintiff's negligence was a cause of the injury?

Yes.

6: If the answer to question 5 is yes, what percentage did plaintiff's fault so contribute?

30 percent.

If you entered a percentage on this question, fill in its equivalent dollar amount here. Multiply the above percentage by the total recovery from question 4.

We have $84,000.

THE COURT: 36,000 subtracted from 120,000?

THE FORELADY: Yes. That's what we have.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. As to question 1, do you find the plaintiff has established his claim that the ship was in an unseaworthy condition and this unseaworthiness played any part at all in causing plaintiff's injury? Your answer is no.

Question 2: Do you find that plaintiff has established his claim that the defendant was negligent and that defendant's negligence played any part at all in causing plaintiff's injury? Your answer was yes.

Question 4: If the answer to either question 1 or 2 above is yes, what is the total amount of damages to plaintiff? Answer in dollars and cents. You awarded $120,000.

5: In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that plaintiff's negligence was a cause of the injury? Your answer is yes.

6: If the answer to question 5 is yes, what percentage did plaintiff's fault so contribute? 30 percent. If you entered a percentage on this question, fill in its equivalent dollar amount here. You multiplied the above percentage by the total recovery from question 4. Answer, $84,000.

7: Subtract the dollar amount stated in question 6 from the total amount of damages stated in question 4 and enter here the difference, which will be the net amount of damages you find plaintiff is entitled to recover.

You awarded $120,000 on question 4.

Question 6 you subtracted $36,000.

The total net recovery is $84,000. And so say you all.

(Each juror answered in the affirmative.)

THE COURT: All right, Mr. Barkan.

MR. BARKAN: I would like to make --

THE COURT: Do you want the jury polled?

MR. BARKAN: Yes.

(Each juror, upon being asked by the Clerk, Is that your verdict?", answered in the affirmative.)

THE COURT: All right, ladies and gentlemen, thank you very much for your time and attention.

(Jury excused)

THE CLERK: For the record, counsel, the verdict will be marked as Court's Exhibit 1.

MR. BARKAN: First I would like to make a motion for a judgment notwithstanding the verdict. I would like to reserve my rights to formally present the motion in ten days.

I would also like to move that the verdict be set aside becasue it is excessive.

THE COURT: I am going to deny that unless -- if you are asking me to make a decision now, I am going to deny it.

MR. BARKAN: I would reserve my rights to formally submit the papers.

THE COURT: If you are reserving your right to in ten

days present a memorandum on it, I will reserve.

MR. BARKAN: Thank you.

A 190

PLAINTIFF'S EXHIBIT 3

CLINICAL RECORD
DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE

(H.D. 4-23-71)

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

3 id

CERTIFICATION – TRUE PHOTOCOPIES OF CLINICAL I

Having been designated as local custodian of the clinical records of the Norfolk, Virginia (Station Name) United States Public Health Service Hospital (Hospital or Station), U.S. Department of Health, Education, and Welfare, pursuant to 42 Code of Federal Regulations 1.107 (d), I hereby certify that the attached documents, consisting of 8 pages, are true photocopies of clinical records pertaining to SHEPPARD, Howard and that the originals of said records are in the files of the said Hospital (Hospital or Station).

11 February, 1974
(Date)

U.S. PUBLIC HEALTH SERVICE * 1798 *

T. F. O'Connell
Thomas F. O'Connell, BRA
(Signature)

Chief, Medical Record Service
(Title of Certifying Officer)

USPHS Hospital, Norfolk, Va. 23508
(Hospital or Station)

Markowitz and Glanstein
50 Broadway
New York, New York 10004

PHS-4949
12-66

A 191

Plaintiff's Exhibit 3

THIS IS TO ACKNOWLEDGE RECEIPT OF PHOTOSTATIC COPIES OF CLINICAL RECORD FOR:

SHEPPARD, Howard (23 93 27)

by_____

Date_____

Return to:
Medical Record Service
US PHS Hospital, Norfolk, Va.

MR-9

A 192

Plaintiff's Exhibit 3

1731

MEDICAL REPORT OF DUTY STATUS

NAME 23 93 27 /72076/ | HOSPITAL REGISTRATION NO.

ADDRESS SHEPPARD, EDWARD [illegible] | AS 1/11/23 / M

INPATIENT	INCLUSIVE DATES OF TREATMENT From:	Through:
OUTPATIENT	DATE 5 2 7-	TIME ARRIVED A.M./P.M.	TIME DEPARTED A.M./P.M.
DISPOSITION	Can resume usual occupation DATE 5/3/73	Can perform limited duties as specified under REMARKS DATE
	To return to clinic DATE	To be hospitalized DATE
	Other (Specify)	

REMARKS

.....FIT

.....NOT FIT FOR DUTY

REGARDING

Light Duty

NAME AND LOCATION OF HOSPITAL OR CLINIC

U. S. Public Health Service Hospital
Norfolk, Virginia

SIGNATURE OF MEDICAL OFFICER OR MEDICAL RECORD LIBRARIAN

DATE 5/2/73

A 193

Plaintiff's Exhibit 3

PHS-1731
4-57

MEDICAL REPORT OF DUTY STATUS

NAME 23 93 27 1/20/67
SHEPPARD, HOWARD 'R' 'L'

HOSPITAL REGISTRATION NO

ADDRESS AS 1/11/23 M

INPATIENT	OF TREATMENT From:	Through:
OUTPATIENT	DATE 4-10-73	TIME ARRIVED A.M./P.M. / TIME DEPARTED A.M./P.M.
DISPOSITION	Can resume usual occupation — DATE	Can perform limited duties as specified under REMARKS — DATE
	To return to clinic — DATE	To be hospitalized — DATE
	Other (Specify)	

REMARKS

U.S. Staff

.....FIT
..NOT FIT FOR DUTY
REGARDING

NAME AND LOCATION OF HOSPITAL OR CLINIC	SIGNATURE OF MEDICAL OFFICER OR MEDICAL RECORD LIBRARIAN	DATE
U. S. Public Health Service Hospital Norfolk, Virginia 23508		4-10-73

A 194

Plaintiff's Exhibit 3

PHS-1731
4-57

MEDICAL REPORT OF DUTY STATUS

NAME: 23 93 27 /72076/ SHEPPARD, HOWARD 'R' 'L' | HOSPITAL REGISTRATION NO:

ADDRESS: AS 1/11/23 M

INPATIENT — INCLUSIVE DATES OF TREATMENT: From: ——— Through:

OUTPATIENT — DATE | TIME ARRIVED A.M./P.M. | TIME DEPARTED A.M./P.M.

DISPOSITION

- Can resume usual occupation — DATE: 5 27-
- Can perform limited duties as specified under: REMARKS — DATE:
- To return to clinic — DATE:
- To be hospitalized — DATE:
- Other (Specify)

REMARKS

.....FIT

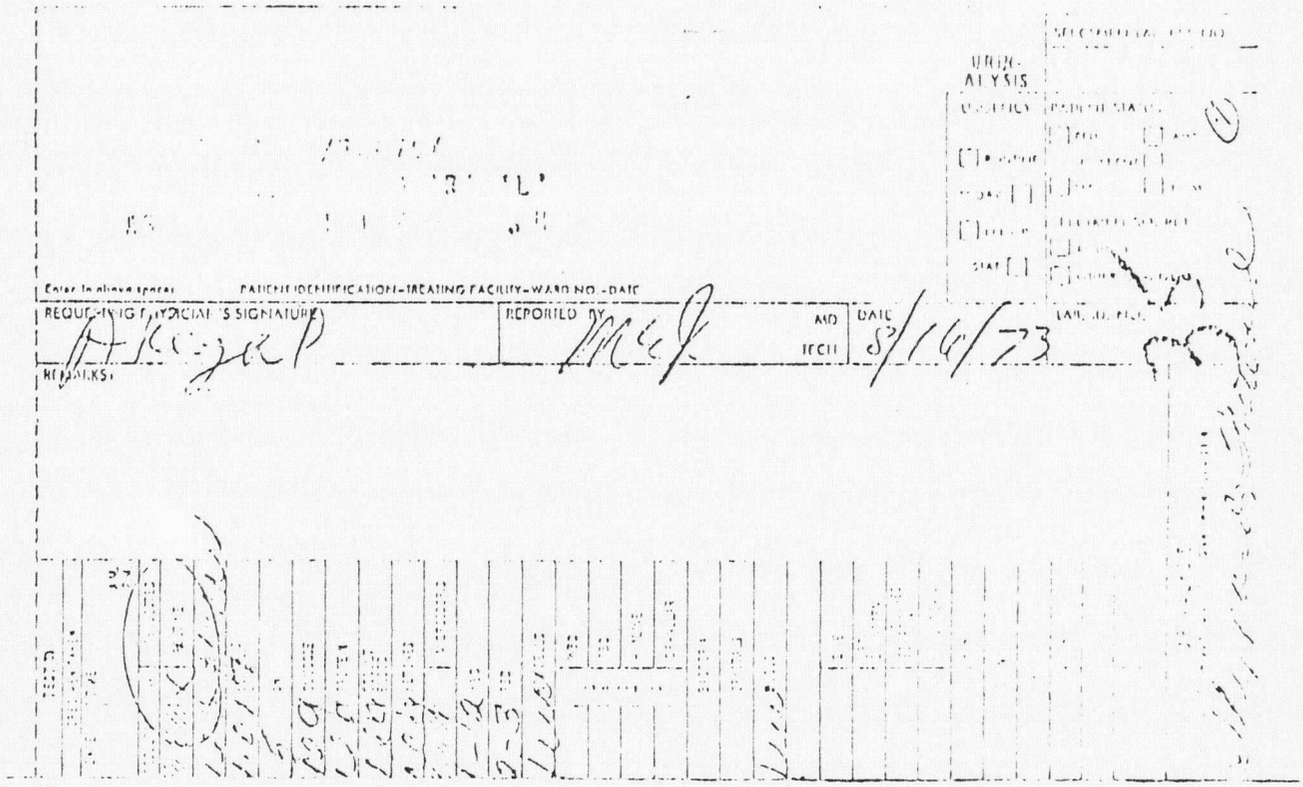
.....NOT FIT FOR DUTY 4/12/23 - 5/2/23

REGARDING

NAME AND LOCATION OF HOSPITAL OR CLINIC	SIGNATURE OF MEDICAL OFFICER OR MEDICAL RECORD LIBRARIAN	DATE
U. S. Public Health Service Hospital Norfolk, Virginia 23508	[signature]	5/2/23

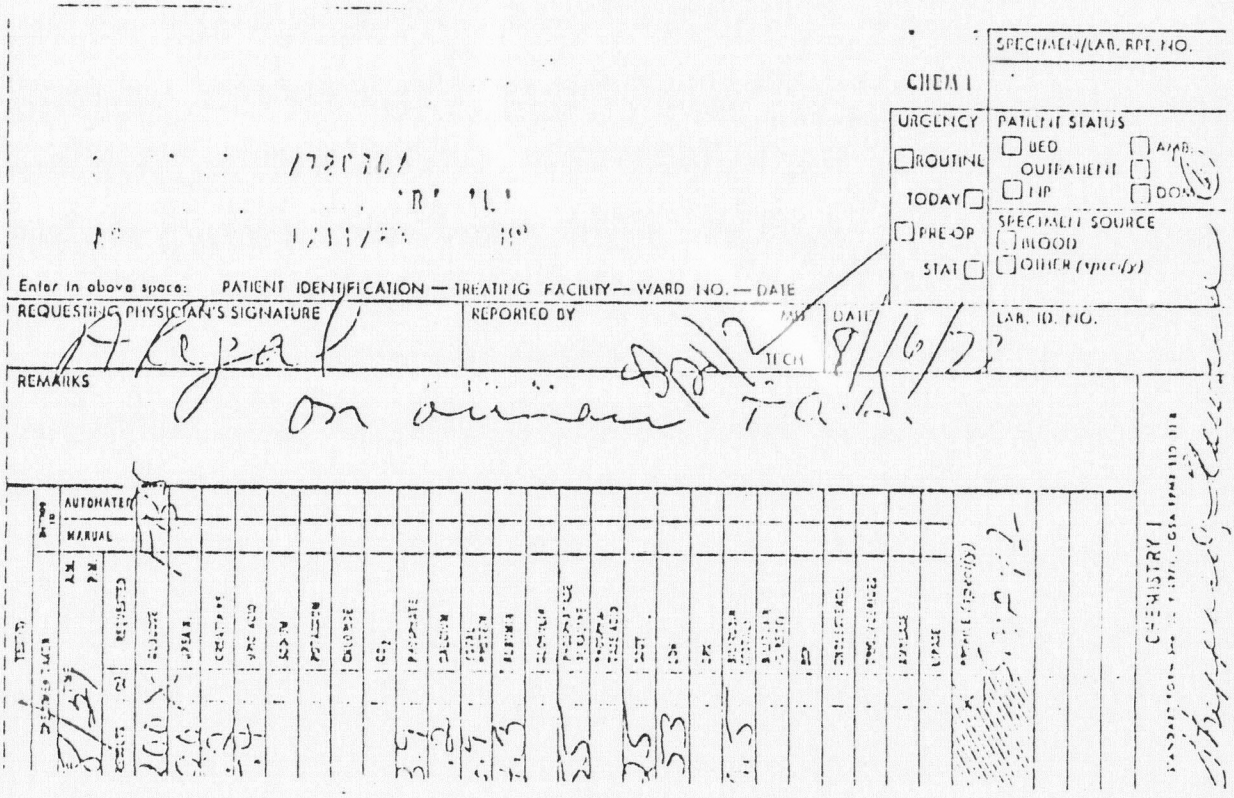
A 195

Plaintiff's Exhibit 3



A 196

Plaintiff's Exhibit 3



CHEM I

SPECIMEN/LAB. RPT. NO.

URGENCY
☐ ROUTINE
TODAY ☐
☐ PRE-OP
STAT ☐

PATIENT STATUS
☐ BED ☐ AMB.
OUTPATIENT ☐
☐ INP ☐ DOM.

SPECIMEN SOURCE
☐ BLOOD
☐ OTHER (specify)

Enter in above space: PATIENT IDENTIFICATION — TREATING FACILITY — WARD NO. — DATE

REQUESTING PHYSICIAN'S SIGNATURE

REPORTED BY MD TECH

DATE 8/16/2

LAB. ID. NO.

REMARKS

On diuretics

TESTS

AUTOMATED
MANUAL

AM PM REQUESTED

RESULTS

GLUCOSE
UREA N
CREATININE
URIC ACID
Na
K
Cl
CO2
PHOSPHATE
CALCIUM
TOTAL PROTEIN
ALBUMIN
BILIRUBIN
PHOSPHATASE ACID TOTAL
PHOSPHATASE ACID PROSTATIC
PHOSPHATASE ALKALINE
CHOL
LDH
SGOT
BILIRUBIN DIRECT
BILIRUBIN TOTAL
TRIGLYCERIDES
TOTAL PROTEIN
ALBUMIN
GLOBULIN
SAMPLE (specify)

CHEMISTRY I

A 197

Plaintiff's Exhibit 3

DOCTOR'S PROGRESS NOTES
(Sign all notes)

C.P.D. [illegible]
Date MAY 25 1973
Time arrived:
Time seen:

C.P.D. WALLIN
Date
Time arrived:
Time seen:

11. 73 B/p 140/80 wt. 208

(5) Some N.M. under sun partial
- [illegible] - following diet, but not [illegible]
(6) - (A) Bun (P) FBS, U/A., R.T.C. 1 week

(A) LBP continue
(P) qod R.O.M.
(-) S.R.I.T.
K.T. & P.T. = +2

(A) LCP 2° chronic L.S. strain
(P) Continue Home T.X. R.T.C. 1 month
Rx Continue T.Q.D. 500 mg. #1 bottle

C.P.D. [illegible]
Date AUG 30 1973
Time arrived:
Time seen:

U.S. GOVERNMENT PRINTING OFFICE 1968 O—335 773

DOCTOR'S PROGRESS NOTES
Standard Form 509
(Revised)

[illegible] (5)

A 198

Plaintiff's Exhibit 3

CLINICAL RECORD | DOCTOR'S PROGRESS NOTES (Sign all notes)

DATE

Appetite — Looks social stress

NFFD
- Val. — Sm pill
- Tylenol X 2 q 4 h.
Lumbar Spinal O
- Not better
- Rest to low back
- RTC - 2 weeks

MAY 2 1973

Pt. now seeking better part
GA 203 NFFD slip - Given new one

Back now better.

Last FBS 350 - (not really FBS?)
1000 Cal. ADA diet
Orinase 500 mg t i d
RTC 2 wk

(Continue on reverse side)

Supervised Ward (2)

A 199

Plaintiff's Exhibit 3

O.P.D. WALKIN

Date 4/12/70

Time 1:55 PM

CC - Sore back.

History fell aboard ship 4 days ago now headache & stiff. ? x-rays ? splinter ? fracture

Extension - Flexion - 30° (+)

Extension - 30° (+)

Side bending (+) & Rot.

Inclination - 1/3 - 5 - vertebra

SRT - 90° bilateral (+)

AJ = KJ -

head + toe testing

DOCTOR'S PROGRESS NOTES
Standard Form 509
(Rev.)

U.S. GOVERNMENT PRINTING OFFICE: 1968 O—333-773

(C)

A 200

PLAINTIFF'S EXHIBIT 6

CERTIFICATE OF SEAMAN'S SERVICE

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

6

NAME: SHEPPARD, HOWARD R. L. | CERT. NO. Z | SEQUENCE | DATE 3-11-72

	NAME OF VESSEL	DATE FROM	DATE TO	TYPE VOYAGE	CAPACITY
	STATE	1-27-69	2-21-69	FN	OS
	STATE	2-1-69	2-13-69	CU	OS
	STATE	2-13-69	4-3-69	FN	OS
	RANGER	4-29-69	4-27-69	CU	FE
[illegible]	RANGER	4-30-69	5-12-69	FN	FE
250541	NORMAC PENN	9-15-69	9-16-69	CU	OS
249412	JULIA	9-17-69	10-3-69	CU	FE
249412	JULIA	10-4-69	1-12-70	FN	FE
249412	JULIA	1-13-70	1-19-70	CU	FE
249412	JULIA	1-20-70	4-10-70	FN	FE
523346	ROBERT E. LEE	5-26-70	6-1-70	CU	FE
251269	AMERICAN CHARGER	6-4-70	6-14-70	CU	FE
248488	AFRICAN NEPTUNE	6-16-70	9-3-70	FN	FE
248815	CORAL GEM	12-2-70	1-20-71	FN	FE
248815	CORAL GEM	1-21-71	1-28-71	IP	FE
248815	CORAL GEM	1-29-71	3-10-71	FCN	FE
248815	CORAL GEM	3-11-71	3-29-71	FN	FE
248815	CORAL GEM	3-30-71	3-31-71	IP	FE
244872	AMERICAN ALLIANCE	4-6-71	4-29-71	FN	FE
248835	YAKA	8-11-71	11-13-71	FN	FE
257384	NORMACRIGEL	12-20-71	4-11-72	FN	FE
244329	AMOCO LOUISIANA	5-20-72	6-14-72	CU	SE

I ACCEPT THE ABOVE IDENTIFIED EXAM MAY BE USED ON THE VESSELS INDICATED
CS

SIGNATURE OF AUTHORIZED OFFICER
J. H. QUEST
DOCUMENTATION AND RECORDS BRANCH
NATIONAL VESSEL RECORDS DIVISION

DATE
1-3-73

PREVIOUS EDITION MAY BE USED

NOTE: EXPLANATION OF CODES ON REVERSE

A 201

Plaintiff's Exhibit 6

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG 721 (REV. 10-70)

— — — M10 — — —

CERTIFICATE OF SEAMAN'S SERVICE

SOCIAL SECURITY NO	NAME	ZIP	CERT NO	DATE OF BIRTH
433-20-5941	SHEPPARD, HOWARD R. L.	Z	388134	2-11-20

OFFICIAL NUMBER	NAME OF VESSEL	DATE FROM	DATE TO	TYPE VOYAGE	CAPACITY
1 254012	BAYOU STATE	1-27-69	2-28-69	FN	SE
2 254012	BAYOU STATE	3-1-69	3-12-69	CU	SE
3 254012	BAYOU STATE	3-13-69	4-3-69	FN	SE
4 249516	WILD RANGER	4-29-69	4-29-69	CU	FE
5 249516	WILD RANGER	4-30-69	5-12-69	FN	FE
6 250541	NORMAC PENN	9-15-69	9-16-69	CU	SE
7 249412	JULIA	9-19-69	10-3-69	CU	FE
8 249412	JULIA	10-4-69	1-12-70	FN	FE
9 249412	JULIA	1-13-70	1-19-70	CU	FE
10 249412	JULIA	1-20-70	4-10-70	FN	FE
11 523346	ROBERT E. LEE	5-26-70	6-1-70	CU	FE
12 250089	AMERICAN CHARGER	6-4-70	6-14-70	CU	FE
13 250405	AFRICAN NEPTUNE	6-16-70	9-2-70	FN	FE
14 248815	CORAL GEM	12-2-70	1-20-71	FN	FE
15 248815	CORAL GEM	1-21-71	1-28-71	IP	FE
16 248815	CORAL GEM	1-29-71	3-10-71	FCN	FE
17 248815	CORAL GEM	3-11-71	3-29-71	FN	FE
18 248815	CORAL GEM	3-30-71	3-31-71	IP	FE
19 251832	AMERICAN ALLIANCE	4-6-71	4-25-71	FN	FE
20 246335	YAKA	8-11-71	11-12-71	FN	FE
21 297384	NORMACRIGEL	12-20-71	4-11-72	FN	FE
22 244329	AMOCO LOUISIANA	5-25-72	6-11-72	CU	SE

I CERTIFY THE ABOVE RECORD WAS MADE FROM THE VESSELS INDICATED

SIGNATURE OF ISSUING OFFICER
J. H. GUEST
DOCUMENTATION AND RECORDS BRANCH
MERCHANT VESSEL PERSONNEL DIVISION

DATE
7-3-72

PREVIOUS EDITION MAY BE USED

NOTE: EXPLANATION OF CODES ON REVERSE

A 202

Plaintiff's Exhibit 6

MSD

CERTIFICATE OF SEAMAN'S SERVICE

SOCIAL SECURITY NO	NAME (Last, First, Middle)	SEX	CERT NO	DATE OF BIRTH
432-23-5941	SHEPPARD, HOWARD R. L.	Z	315314	5-15-28

	OFFICIAL NUMBER	NAME OF VESSEL	DATE FROM	DATE TO	TYPE VOYAGE	CAPACITY
1	279371	AMERICAN RELIANCE	6-29-72	9-13-72	FN	FE
2	252746	SANTA ANA	11-14-72	11-17-72	CU	FE
3	252746	SANTA ANA	11-18-72	1-19-73	FN	FE
4	530143	LASH TURKIYE	2-21-73	4-9-73	FN	FE
5	263030	NEW YORKER	6-22-73	7-8-73	CU	SE
6	501712	PRESIDENT MONROE	7-16-73	7-20-73	FN	FE
7	243436	AZALEA CITY	8-20-73	10-16-73	CU	FE
8	5060360	GREEN WAVE	10-23-73	10-25-73	CU	FE
9	506060	GREEN WAVE	10-26-73	1-31-74	FN	FE
10	263030	NEW YORKER	5-10-74	7-12-74	CU	FE
11	243436	AZALEA CITY	7-22-74	8-16-74	CU	SE
12	263030	NEW YORKER	9-6-74	9-14-74	CU	FE
13	263030	NEW YORKER	9-26-74	10-3-74	CU	FE
14						
15						
16						
17						
18						
19						
20						
21						
22						

I CERTIFY THE ABOVE IDENTIFIED MAN HAS SERVED ON THE VESSELS INDICATED

CO

SIGNATURE OF SHIPPING OFFICER

J. H. GUEST
DOCUMENTATION AND RECORDS BRANCH
MERCHANT VESSEL PERSONNEL DIVISION

DATE

1-8-75

PREVIOUS EDITION MAY BE USED

NOTE: EXPLANATION OF CODES ON REVERSE

~~[illegible]~~ TWO copies of the within APPENDIX is hereby admitted this 12TH day of AUGUST 1976

Attorneys for APPELLEE